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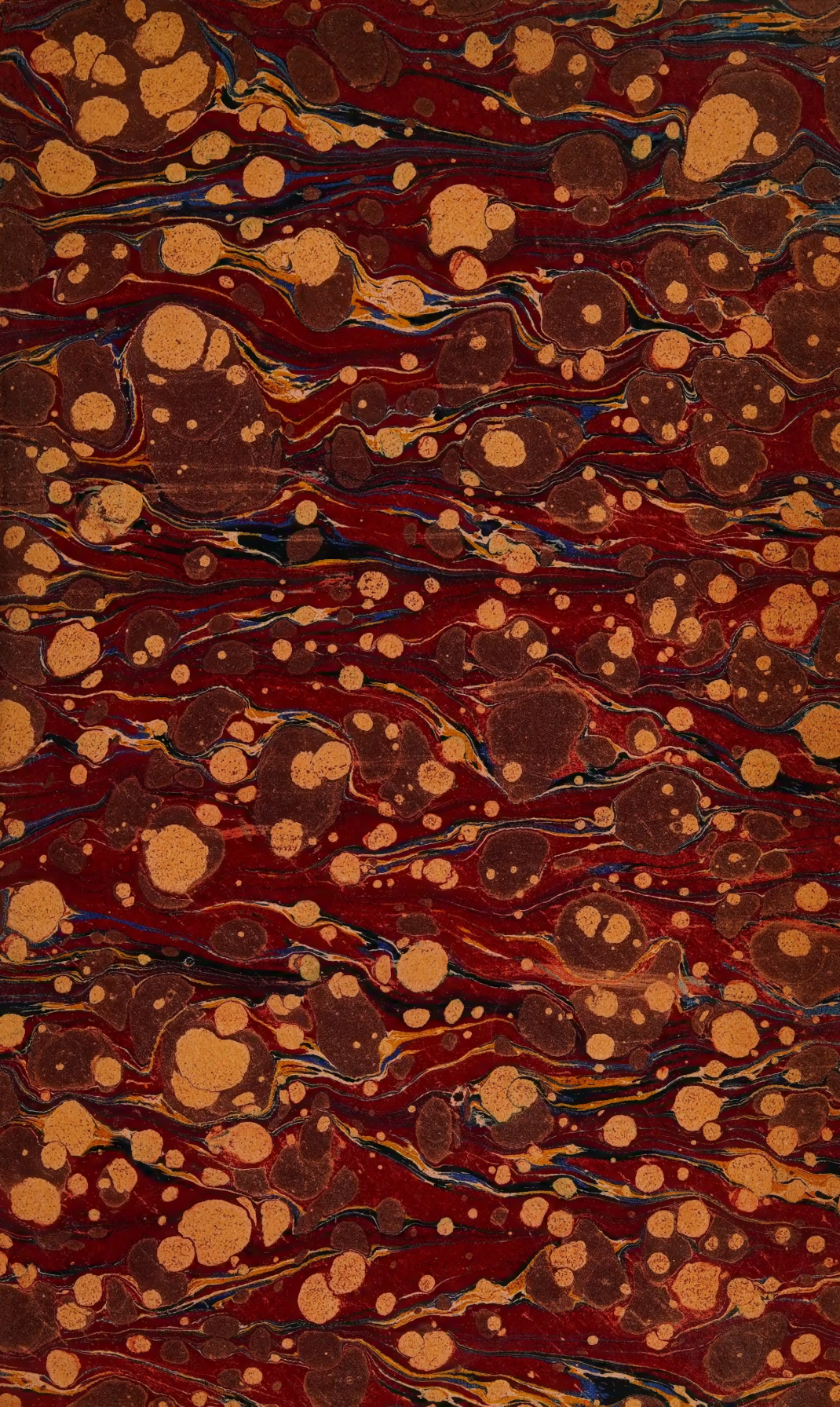

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THE

LAW REPORTS.

Courts of Probate and Divorce.

REPORTED BY

RICHARD SEARLE, Barrister-at-Law,

AND

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EDITED BY

JAMES REDFOORD BULWER, Q.C.

VOL. II.

FROM MICHAELMAS TERM, 1869, TO MICHAELMAS TERM, 1872,

BOTH INCLUSIVE.

XXXIII—XXXV VICTORIA.

LONDON:

Printed for the Incorporated Council of Law Reporting for England and Wales

BY WILLIAM CLOWES AND SONS,

DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.

PUBLISHING OFFICE, 51, CAREY STREET, LINCOLN'S INN, W.C.

1872.

JUDGE

OF

THE COURT OF PROBATE

AND

THE COURT

FOR

DIVORCE AND MATRIMONIAL CAUSES,

XXXIII—XXXV VICTORIA.

The Right Hon. Lord Penzance.

THE QUEEN'S ADVOCATES.

Sir Robert J. Phillimore, Knt., Q.C., D.C.L.

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6324

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CASES

DETERMINED BY THE

COURT OF PROBATE

AND BY THE COURT FOR

DIVORCE AND MATRIMONIAL CAUSES

IN AND AFTER

MICHAELMAS TERM, XXXIII VICTORIA.

BECKETT *v.* HOWE AND OTHERS.

1869
Nov. 16.

Will—Execution—Signature of Testator not seen by Witnesses—Acknowledgment.

The testator requested one person to attend to witness his will and another to witness a paper. They both attended at the time and place appointed when the testator produced a paper so folded that no writing on it was visible, and informed them that in consequence of his wife's death it was necessary to make a change in his affairs, and he asked them to sign their names to it, which they did. The testator did not sign in their presence, nor did they see his signature. The paper had an attestation clause upon it in the handwriting of the testator, but not quite in the ordinary form :—

Held, that there had been a sufficient acknowledgment of the signature.

JOHN LONG, late of Sidmouth Terrace, Bermondsey, Surrey, died on the 22nd of March, 1869. The plaintiff, Thomas Beckett, as sole executor named therein, propounded a will of the deceased dated day of July, 1868. The defendants, Sarah Howe and Ann Topham, two of the next of kin of the deceased, pleaded that the will propounded was not duly executed according to the provisions of the statute 1 Vict. c. 26; and they gave notice that if the two attesting witnesses to the said will were called by the plaintiff, they only intended to cross-examine the witnesses in support of the will. The will, which was in the handwriting of the

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deceased, covered the three first sides of a sheet of foolscap paper and three lines on the top of the fourth side. Beneath was written :—

"Witness my hand, Henry John Long.

"In witness whereof we, the undersigned, have at the request of the testator, in his presence, and in the presence of each other, severally subscribed our names.

"Witness our hands { Henry Prestage, Isaac Oakley."

The writing altogether occupied the upper half of the fourth side of the paper; the lower half was blank.

The attesting witnesses gave the following evidence as to the execution :—

Isaac Oakley: I was well acquainted with Mr. Long, the testator. In July, 1868, I signed his will. It was, I believe, on the 16th. I was walking on the Sunday before the 16th with Mr. Long, and he asked me to step across to Mr. Prestage's one evening to see him (Mr. Long) sign his will. Mr. Prestage lived opposite to me. Mr. Long told me he would let me know the day. I went one evening. I found Mr. Long there, Mr. and Mrs. Prestage and their son. Mrs. Prestage and her son left the room. Mr. Long took a paper from his pocket, unfolded it, and then began folding it again. He folded it in the way he wanted it to lie when I signed. [The witness shewed the Court in what way the deceased folded the paper, the lower blank part was turned over so as to completely cover the attestation clause.] Before I signed the paper, Mr. Long said, "The death of Mrs. Long has necessitated an alteration in my *affairs* or *will*." I am not certain which word he used. The will was lying on the table. Mr. Long moved the table towards Mr. Prestage, as he was the oldest. He had covered up everything except where he wanted us to put our names. The paper was passed first to Mr. Prestage, then to me. We signed. Mr. Long took the paper, saying he did not suppose we should hear any more of it.

On cross-examination, he said: When Mr. Long first took the paper out of his pocket I was talking to the other witness. I saw no writing. I do not recollect seeing the words "witness our hands." I saw no writing whatever. Mr. Long did not use the word "will" at all that evening.

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Henry Prestage: In July, 1868, on a Tuesday, I was walking with Mr. Long. He said, "I want you to sign a paper for me. What evening will it be convenient for you to do so?" I said, "Any evening you may appoint after seven o'clock." He said he wished Mr. Oakley to be present. The time appointed was eight o'clock on the 16th of July. Mr. Long came at a quarter to eight. He went into my sitting room. After Mr. Oakley had arrived, Mr. Long said, "You are aware there has been a change in my circumstances which causes an alteration in my affairs." We were all sitting down, and whilst he said this he was adjusting a paper which he had taken from his side pocket. He kept moving it about. Nothing was going on between us and Mr. Long. He was silently adjusting the paper. There was writing on the paper. Mr. Long said, "Prestage, sign it first." I signed it. Then Oakley signed it, and it was handed to Mr. Long, who said, "Well, I do not suppose you will hear anything more of this."

On cross-examination, he said: Looking at the words, "witness our hands," I cannot affirm such words were there when I signed. The will is in Mr. Long's handwriting. Mr. Long made no attempt at concealment when he first unfolded the paper. It is my impression that he so folded the paper that we could not see the writing.

In answer to the Court, he said: I was under the impression I was signing a will. I deduced it from the observation the deceased made that a change in his circumstances involved an alteration in his affairs. I could not have seen the signature of the deceased when he unfolded the paper. I was too far off. It would have been rude for me to have looked too closely at what he was doing.

Dr. Tristram, for the plaintiff, contended that there was sufficient evidence before the Court to enable it to come to the conclusion that the will was duly executed. The signature was on the will at the time of execution, and the witnesses, if they had not been talking, might have seen the signature when the deceased unfolded the will.

[LORD PENZANCE. You have got as far as this. The deceased called in these two persons for some purpose. To one witness he said he wished him to put his name to a will; to the other, to a

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paper. To both he said that there had been an alteration in his circumstances which required a change in his affairs. There is no distinct proof that the signature of the deceased was written at the time of the execution; there is, that if it were there, it could not have been seen in consequence of the way in which the paper was folded. The question is, was there a sufficient acknowledgment?]

Dr. Spinks, Q.C. (*Searle* with him), for the defendants. No presumption arises from the attestation clause, for it does not say that the paper was signed or acknowledged in the presence of the witnesses. Possibly the deceased did not know it was necessary it should be so. If there was an intention on the part of the deceased to acknowledge his signature, why did he cover it up?

[The cases referred to were *Ilott* v. *Genge* (1); *Cooper* v. *Bockett* (2); *In the Goods of J. Holgate* (3); *Gwillim* v. *Gwillim* (4); *In the Goods of Hammond* (5); *In the Goods of Pearsons* (6); *In the Goods of Swinford.* (7)]

Cur. adv. vult.

Nov. 16. LORD PENZANCE. The Court took time in this case in order to consider the former decisions, and to see whether any case already decided in any way qualified the doctrine propounded in *Gwillim* v. *Gwillim.* (4) The question for my decision is, whether the will in this case was properly executed. The facts are these. A few days before the will was executed, the testator said to one of the intended witnesses he wished him to come and witness *his will;* to the other likewise he said he wanted him to sign a paper, but did not mention what paper. In accordance with an arrangement one evening, at the appointed hour, the parties met. Both the witnesses having arrived, the testator produced a paper carefully folded up, so that the witnesses could not see what was written upon it. He made the remark in the hearing of both that the death of his wife necessitated an alteration in his affairs, and then he asked the witnesses to sign their names, which they did. The sum and substance is, that the witnesses did not see the testator's signature, nor did the testator say it was there, but he did tell one

(1) 3 Curt. 160, 172.
(2) 4 Moo. P. C. 419.
(3) 1 Sw. & Tr. 261.
(4) 3 Sw. & Tr. 200.
(5) 3 Sw. & Tr. 90.
(6) 33 L. J. (P. M. & A.) 177.
(7) Law Rep. 1 P. & M. 630.

(3 SC 5 Jur NS 251 (6 SC 10 Jur NS 372.

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witness that he was going to execute a will, and indirectly to both he expressed that intention, for he told them that some alteration was necessary in his affairs by reason of his wife's death. The doctrine in *Gwillim* v. *Gwillim* (1) is this, that if the testator produces a paper, and gives the witnesses to understand it is his will, and gets them to sign their names, that amounts to an acknowledgment of his signature, if the Court is satisfied that the signature of the testator was on the will at the time. Whether that decision was right or wrong, I have not to determine. It was founded on other cases. Provided the testator acknowledges the paper to be his will, and his signature is there at the time, it is sufficient. I think the circumstances in this case come up to the requirements laid down in *Gwillim* v. *Gwillim.* (1) What the testator said was tantamount to saying this is my will, and I am satisfied that the signature was there at the time. It may be asked, what evidence is there that the signature was there? If direct evidence be required, there is none in the case, but the Court may judge from the appearance of the paper, and the circumstances of the case generally, and on this head there was quite as much evidence as in *Gwillim* v. *Gwillim.* In that case Sir C. Cresswell said (2):—"If it were necessary to have direct evidence that the name of the testator was on the will when he acknowledged it by asking them to witness his will, the proof of the executor would fail; but that certainty is not necessary. . . . I am, therefore, at liberty to judge from the circumstances of this case whether the name of the testator was on the will at the time of the attestation or not. It is hardly likely that this testator, who knew that there must be two witnesses to the will, did not know that he must sign it before they did, and either sign it or acknowledge it in their presence." Word for word these observations apply to the present case. The testator himself wrote an attestation clause, which although not in the ordinary terms, clearly shews that the testator knew what forms are required in executing a will. Sir C. Cresswell concludes thus, "I cannot, therefore, but think that the name of the testator was written at that time, and that by asking these old ladies to witness his will, he did acknowledge his signature." I think this will was duly executed, and I decree probate of it.

(1) 3 Sw. & Tr. 200 (2) 3 Sw. & Tr. at pp. 205, 206.

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Dr. Spinks, Q.C., on behalf of the next of kin, applied that their costs should be paid out of the estate.

THE COURT declined to make any order as to costs.

Proctors for plaintiff: *Rothery & Co.*
Attorneys for defendants: *Ingle, Gooddy, Cooper, & Holmes.*

Nov. 16.

IN THE GOODS OF JAMES SEBASTIAN GILL.

Will—Written Directions affixed hereto—None affixed—Insufficient Reference.

The deceased, in 1866, executed a will, and a few days afterwards a paper, which he called directions to his executors to form a part of his will. In 1868 he executed a fresh will, revoking all former wills and codicils. In this last will he expressed a wish that the goods and chattels in and about the rooms he should occupy at the time of his decease should be disposed of according to the written directions left by him, and affixed to his will. No paper was found affixed to his will, but the codicil abovementioned, which in many respects answered to the written directions described in the will, was found in his private room:—

Held, that it could not be included in the probate.

JAMES SEBASTIAN GILL, of Reading, Berkshire, gentleman, on the 9th of August, 1866, duly executed a will, in which he named the Rev. Francis Turner Gill, and Robert Haynes Lovell, executors. On the 12th of August, 1866, he also duly executed a paper, which was addressed "To my executors, Rev. Francis T. Gill, Vicarage, Warfield, Brocknell, and R. Haynes Lovell, Brookfield, Fremington, near Barnstaple, North Devon. I have written the following directions for your guidance with respect to things and goods not mentioned in my will, which said will very probably will be found at Wm. Weedon, Esqr.'s, solicitor, Reading. You as my executors, in whom I have the greatest faith as regards your honour and integrity that I feel confident that all my wishes will be carried out faithfully, and that this will form a part or portion of the aforementioned will." The paper then disposes of books, pictures, sketches, fishing tackle, double barrel gun, presentation jewels, and wearing apparel.

On the 2nd of November, 1868, the testator executed another will, in which he appointed the same executors as in the former

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IN THE GOODS OF GILL.

will, and by which he revoked all former wills and codicils by him at any time made. This will contained the following clause:— "All my books, pictures, sketches, guns, rods, goods and chattels in and about the rooms I shall occupy at the time of my decease, I wish my executors to dispose of faithfully and conscientiously, according to the written directions left by me and affixed to this my will, trusting, as I unhesitatingly do, on their honour and integrity."

On the 21st of April, 1869, the testator executed a codicil, by which he gave one or two trifling legacies, and otherwise confirmed his will. No written directions were ever affixed to the will of the 2nd of November, 1868, and the only directions which could be found were so found in a box in the private sitting room of the testator, and were those dated the 12th of August, 1866.

C. A. Middleton moved for probate of the will of November, 1868, the codicil of April, 1869, and of the directions executed August, 1866. The directions were in existence at the time the will of 1868 was executed, and are sufficiently identified by it. He referred to the following cases: *In the Goods of James Gordon Duff* (1); *In the Goods of Sunderland* (2); *In the Goods of Stewart.* (3)

LORD PENZANCE. The testator executed a will in 1866. Three days afterwards he executed another paper, which was addressed to his executors, and commenced: "I have written the following directions for your guidance. . . . I feel confident that all my wishes will be carried out faithfully, and that this will form a part or portion of the aforementioned will." It is clear, therefore, that he intended that this paper should be incorporated with, and form a portion of, his will of 1866. In 1868 he executed a new will by which he revoked all former wills, and this will contained the following clause: "All my books, pictures, sketches, guns, rods, goods and chattels in and about the rooms I shall occupy at the time of my decease, I wish my executors to dispose of faithfully and conscientiously according to the written directions left by me, and affixed to this my will." I am not satisfied

(1) 4 N. of C. 474. (2) 35 L. J. (P. M. & A.) 82.
(3) 3 Sw. & Tr. 192.

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that the articles mentioned in the paper produced were those in the rooms the deceased occupied at the time of his death, although possibly a great many of them were the same, nor is there a sufficiently distinct reference to that list (although described as in existence) in the words "left by me and affixed to this my will;" for in fact, when the will was found, there was no paper affixed to it. I am asked to go back to the former will which has been revoked, and say that a portion of it was not revoked, and forms part of the last will of the deceased, but that is impossible. It may very well have been that the deceased had made two or three lists after the one he executed in 1866. Even if the list otherwise satisfied the terms of the will describing it, the Court could not say that it is the one referred to, as it is not affixed to the will, and therefore it is not identified. Probate must issue of the will and codicil alone.

Attorneys: *Pitman & Lane.*

Dec. 14.

GRANT AND GRANT *v.* GRANT.

Appointment of Executor—My Nephew, A. B.—Wife's Nephew of that Name resident with Testator—Brother's Son—Parol Evidence.

The testator appointed as executor to his will his nephew, A. B. At the time of the execution of the will there was living a son of the brother of the testator of that name, with whom, however, the testator was not on terms of intimacy; and there was also a person of the same name, who was the nephew of the testator's wife, who had lived with him for many years, and had latterly managed his business:—

Held, that where a word is used in a will as part of a description of a person specified by name, and is applicable to persons so named in an ordinary and popular sense, as well as in a strict and primary sense, an ambiguity is raised, and the Court may receive evidence of the circumstances in which the testator was placed when he executed his will, and of the sense in which he was accustomed to use the word in order to ascertain the person indicated.

JOHN GRANT, of Rugby, Warwickshire, dealer in marine stores, died on the 22nd of February, 1868. He duly executed a will and codicil bearing date respectively the 18th of February, 1868, and the 21st of February, 1868. In the will he left to his nieces, Ann Liggins, Mary Pettifer, and Emma Bench, certain property; and continued: "I bequeath to my nephew, Joseph Grant, the

sum of 500*l.* and all the stock and household effects in the house where I now live; and I devise to my said nephew, Joseph Grant, his heirs and assigns, the said house and premises where I now live." Having bequeathed to his nephew James Grant a certain house, and the residue of his real and personal estate, he concluded: "I appoint my said nephew Joseph Grant executor of this my will." In the codicil he appointed James Grant executor, "in conjunction with my nephew Joseph Grant." The testator had originally four brothers, two of whom died before the date of the will, without leaving children: Thomas Grant, a third brother, died also many years ago, leaving three daughters, the abovementioned Ann Liggins, Mary Pettifer, and Emma Bench, and a son, the abovementioned James Grant; and William Grant, the fourth brother, survived the deceased. William Grant had several sons, and one of the youngest was the defendant Joseph Grant. He resided about thirteen miles from Rugby, and it was alleged on behalf of the plaintiff, and not denied, that the deceased had been on bad terms with his brother William and his family for many years, and had hardly any acquaintance with them or either of them. The testator was married to his first cousin Jane Scott, widow, whose maiden name was Jane Grant. The plaintiff Joseph Grant was her brother's son, and in the year 1853, when a lad of eight years old, he was taken into the house of the deceased and Jane Grant, and was brought up and educated by them, and resided with them until the death of his aunt, Mrs. Grant, and subsequently, until the death of the testator. During the latter period of the life of the testator, this Joseph Grant was employed in the management of the testator's business; and he always called the testator his uncle, and the testator always spoke of him as his nephew.

The question for the determination of the Court was, whether the plaintiff or the defendant was the person entitled to probate of the will and codicil of the deceased as *my nephew, Joseph Grant,* named as executor therein. The other plaintiff James Grant survived the deceased, but afterwards died. Affidavits to support the above facts were filed.

Nov. 7. *Field, Q.C.*, and *Dr. Middleton*, for the plaintiff, contended

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GRANT v. GRANT.

that the word nephew has no strict and legal sense. It originally signified descendant, in which sense it was used by classical writers, up to the beginning of the last century, and afterwards it was used by such writers indiscriminately, as the son of a brother or sister by consanguinity or affinity. The description of the executor, therefore, being equivocal, parol evidence is admissible to define the individual intended to be described by the testator. [On this point they referred to *Miller* v. *Travers* (1), I Timothy v. 4; Hooker's Laws of Ecclesiastical Polity, bk. v., ch. 20; Locke on Government, sec. 141; Shakespeare, "Richard II.," act ii., scene 2; "Richard III.," act iv., scene 1; "Much Ado about Nothing," act v., scene 1; Wigram on Wills, props. 2, 3, 5.] Inasmuch as the testator was not aware at the time he executed his will that his brother had a son named Joseph, even if the word nephew be interpreted to mean brother's son, in its primary sense, it will not be sensible with reference to extrinsic circumstances, and the Court may therefore consider whether it would be so sensible in some popular sense.

Dr. Swabey, and *Chapman*, for the defendant, contended that the strict and primary sense of the word nephew is brother's or sister's son, and that as the defendant, a brother's son, was living at the date of the execution of the will, there is no ambiguity in it, and no evidence is admissible to shew that the testator intended to appoint some other person than the defendant. They referred to Richardson's Dictionary (nephew), Todd's Johnson's Dictionary (nephew), *Smith* v. *Liddiard* (2), *James* v. *Smith* (3), *Adney* v. *Greatrex* (4), *Doe* d. *Westlake* v. *Westlake*. (5)

Cur. adv. vult.

Dec. 14. LORD PENZANCE. The question in this case is the proper construction of a will. The facts to be found on the affidavit make the testator's real meaning abundantly clear. The question is how far, and to what extent, these facts can be properly used by the Court to aid in construing the will. The words to be construed are, "I appoint my said nephew Joseph Grant executor."

(1) 8 Bing. 244.
(2) 3 K. & J. 252.
(3) 14 Sim. 214.
(4) 38 L. J. (Ch.) 414.
(5) 4 B. & A. 57.

In the former part of the will, "my nephew, Joseph Grant," is named as a legatee. To construe this provision, and apply it to the proper individual, some evidence is necessary to ascertain whether the testator had a nephew named Joseph Grant. It turns out that there was living at the date of the will a son of the testator's brother, whose name was Joseph Grant.

It further appears that there was also living another Joseph Grant, who was a nephew of the testator's wife, and consequently, in ordinary parlance, a *nephew* of the testator. If the word *nephew* can be properly construed by the Court to include his wife's nephew, so that there are two persons, to either of whom the words of description might be applied, it is not denied that some further parol evidence would be admissible to ascertain which of the two the testator meant.

And it is clear that if this field of inquiry is once entered upon, the facts will abundantly shew that the wife's nephew, who lived with him, and not his own nephew, with whom he had no intimacy, was the person intended. But here it is contended that the word *nephew* cannot possibly be construed to include the *nephew* of the testator's wife.

It is said that the Court is bound by the primary signification of words used in a will, and that nothing but the primary signification in the strictest sense can be resorted to, unless that signification would produce some absurdity or render the meaning insensible. A proposition of this kind is no doubt to be found in Sir James Wigram's book. But a great deal turns upon the question what is meant by the expression *primary signification.* It will not do to carry it too far. When a man makes his will it is fair to presume that he uses ordinary language in its ordinary sense, and if the original signification of a word is scrupulously followed in all cases, to the exclusion of that which by the common consent and use of mankind it has in process of time acquired, the Court would be carried in some cases a long way from the testator's intention in the endeavour strictly to follow it.

Furthermore, the use and custom of particular counties and places affix to certain words and terms particular meanings. Evidence of such meanings has always been permitted in the construction of written contracts, and why not in that of a will?

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Indeed in the case of a will such evidence has been admitted. In the case of *Richardson* v. *Watson* (1), the testator had devised "the close in the occupation of Watson." Watson occupied two closes. It was contended that the word *close*, though primarily and strictly applicable to an enclosure or field, was popularly applied to a farm; and Lord Wensleydale, a great authority on niceties of construction, said (2):—"Parol evidence was undoubtedly admissible to shew that Watson occupied two closes, and generally speaking evidence might be given to shew that the testator used the word *close* in the sense which it bore in the county where the property was situated as denoting a farm."

Now, if the popular use of a word in a particular locality may be proved and accepted, why is the popular use of a word all over the country to be rejected? Another thing has to be considered when the Court is dealing with a personal description. It may be that the testator had been in the habit of applying a particular designation to an individual, and, if the evidence may be referred to, it is plain in this case that the testator did constantly use the word *nephew* to designate his wife's nephew. If this designation, then, so used is not at variance with its ordinary and popular meaning, it seems unreasonable to reject it wholly in favour of some primary meaning, which excludes that individual.

The strength of such evidence ought, no doubt, to determine whether the Court can act upon it or not in each particular case; but what I am now considering is, not its effect, but its admissibility. It may be that the word *nephew*, when used as the sole description of a class, who are to take benefit under a will, must be construed to include only the sons of brothers or sisters of the testator; and in *James* v. *Smith* (3) it appears to have been so construed. But this does not appear to me to preclude a wider signification being attached to the word when used as an additional description of a person specified by name, to whom the word is in an ordinary and popular sense applicable. Upon the whole, then, I am of opinion that so much of the evidence as shews the relation and circumstances in which the respective parties stood to the

(1) 4 B. & Ad. 799. (2) 4 B. & Ad. at p. 799.
(3) 14 Sim. 214.

testator, and the sense in which he habitually used the word *nephew* when referring to Joseph Grant, his wife's nephew, is admissible as placing the Court in the position of the testator, and thus enabling it to understand the meaning of his language. And the Court construes the appointment of executor to have been intended to apply to Joseph Grant, the nephew of the testator's wife, and decrees probate to him accordingly. (1)

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Proctors for plaintiffs: *Shephard & Skipwith.*
Attorneys for defendants: *Dubois & Maynard.*

MILLER *v.* MILLER.

Nov. 23

Suit for Restitution by Husband—Gross Charges made by Respondent abandoned at the Hearing—Separate Income of Wife—Costs.

The husband having sued for restitution of conjugal rights, the wife in her answer made charges of serious misconduct against him, which, however, were abandoned at the hearing. The Court made a decree in favour of the husband; but the wife evaded service of such decree by remaining out of the jurisdiction of the Court. On being satisfied that the wife had a sufficient separate income, the Court condemned her in the costs of the proceedings.

IN this case Dr. Miller petitioned the Court to order his wife to return to cohabitation. The respondent appeared and filed an answer, in which she charged her husband with cruelty and other serious offences. The petition came on for hearing before the Judge Ordinary and a special jury on the 14th of July, 1869, when the respondent, by her counsel, admitted that she could not establish the charges made in her answer, and the Court pronounced a decree for restitution of conjugal rights, reserving the question of costs. An affidavit was filed from Robert Miller, the attorney of the petitioner, in which he stated that the respondent has a separate income to the amount of 760*l.* per annum. That in the year 1864, at the express desire of the respondent, the petitioner disposed of his business as a medical man. That on the 15th of November, 1866, the respondent left her home, taking with her furniture and other things, and that since that time the petitioner has had no advantage from his wife's separate estate. That the

(1) See also *Doe* d. *Gains* v. *Roose*, 5 C. B. 422.

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respondent is travelling abroad, and cannot be personally served with the decree made by the Court.

Dr. Spinks, Q.C., and *Dr. Tristram*, moved the Court to condemn the respondent in the costs. So far as the merits of the case are concerned, the Court will have no hesitation in making the order; the question is, has it the power to do so? The words of 20 & 21 Vict. c. 85, s. 51, are very general. "The Court, on the hearing of any suit, may make such order as to costs as to the Court may seem just." There are several cases in which the Court has exercised a discretion as to the wife's costs: *Robinson* v. *Robinson* (1); *Glennie* v. *Glennie and Bowles* (2); *Carstairs* v. *Carstairs and Others* (3); *Wells* v. *Wells and Cottam* (4); see also Rules and Orders (1866), 159. In one case (*Milford* v. *Milford* (5)) in the House of Lords, the wife was condemned in costs, and in this court in *Morgan* v. *Morgan and Porter* (6), the wife was ordered to pay out of the fund allotted for her defence certain costs incurred by the petitioner by reason of a charge alleged against him and not proved. In the Ecclesiastical Courts the wife was a privileged suitor only so long as she had no separate income: *Wilson* v. *Wilson* (7); *D'Aguilar* v. *D'Aguilar.* (8)

Dr. Deane, Q.C. (*Ernst Browning* with him), for the respondent, admitted that under the section referred to the Court has power to make an order as to the costs of either party, but submitted that, in accordance with the almost invariable practice, it will not exercise its discretion in such matter adversely to the wife. In *Gaston* v. *Gaston* (9) the wife had instituted a suit of nullity of marriage by reason of the impotency of her husband, and subsequently a second suit for judicial separation by reason of his adultery, the Court refused to condemn her in the costs of the first suit, although it was shewn that she had a separate income.

THE JUDGE ORDINARY. Two questions arise in this case. First, has the Court power to condemn the wife in her husband's costs of

(1) 1 Sw. & Tr. at p. 400.
(2) 3 Sw. & Tr. at p. 111.
(3) 3 Sw. & Tr. 538.
(4) 3 Sw. & Tr. 593.
(5) 37 L. J. (P. & M.) 77.
(6) 38 L. J. (P. & M.) 43.
(7) 2 Hagg. Cons. at p. 204.
(8) 1 Hagg. Eccl. at p. 788.
(9) Not reported.

suit? Secondly, whether, if it has the power, it will ever exercise it? There is no doubt whatever that the Court has the power. The 51st sect. of the Divorce Act enacts that the Court at the hearing of any suit may make such order as to costs as to the Court may seem just. Will it, then, ever make such an order against the wife? I can see no reason why she should be allowed, where she has got a separate income, to enter into any amount of litigation, however vexatious, and then to retire from the contest and get clear off without being called upon to bear any part of the burden so cast upon her husband. It seems to me that that is contrary to natural justice. The reason of the wife's immunity from costs is that it is presumed that the wife has no property, because her property passed to her husband on marriage; but under the auspices of the Courts of Equity she can now enjoy property for her separate use; if she does so the reason fails. Of course the Court, in exercising its discretion in reference to costs, will bear in mind other principles, as it did in *Carstairs* v. *Carstairs and Others.* (1) In the House of Lords before the husband got a divorce he was required to make some provision for the maintenance of his wife, and so this Court will not make an order as to costs which will absorb the wife's means of livelihood. In the present case the wife has a separate income of 760*l.* per annum, and the costs are not likely to be very large in proportion; I feel no difficulty, therefore, in making the order that she shall pay the costs of suit, including the expense of this application.

Attorney for petitioner: *R. Miller.*
Attorney for respondent: *A. Jones.*

(1) 3 Sw. & Tr. 538.

1869
Dec. 14.

LETTS *v.* LETTS.

Suit for Dissolution—No appearance for Respondent—Decree Nisi—Leave to Respondent to attend Taxation.

In a suit for dissolution of marriage the husband, having no defence, did not enter an appearance, and a decree nisi was made against him. The Court gave him permission to attend before the registrar on the taxation of his wife's costs.

THIS was originally a suit for dissolution of marriage brought by Mrs. Frances Cornelia Jane Letts against her husband, Joseph William Letts, by reason of bigamy coupled with adultery. The respondent did not enter an appearance, and a decree nisi was made on the 19th of November last.

Searle moved for leave to the respondent or his solicitor to attend before the registrar on the taxation of his wife's costs, although he had not entered an appearance in the suit.

THE JUDGE ORDINARY. Although it may not be necessary for a man having no defence to enter an appearance to a petition, he may rightly claim to attend before the registrar in order to object to his wife's bill of costs. Reason seems to be in favour of the application; and, as there is no opposition, I shall grant leave.

Proctor for respondent: *E. Crosse.*
Attorney for petitioner: *A. O. Underwood.*

CONSTABLE *v.* CONSTABLE. 1869

Alimony pendente lite—Practice—Rules 84 *&* 89. *Nov.* 3.

A husband who has not filed an answer on oath to the petition for alimony pendente lite under the 84th rule, cannot cross-examine the witnesses produced in support of the petition, on the motion for an allotment, or contradict their evidence.

THIS was a suit by a wife for a restitution of conjugal rights. The husband had entered an appearance, but had filed no answer. A petition for alimony, pendente lite, had been presented, and no answer on oath to that petition having been filed, notice was given under the 89th rule that an application would be made by motion for an allotment of alimony, and that witnesses would be examined.

Holl, for the petitioner, examined her in support of the allegations in the petition as to the respondent's income.

Bosanquet, for the respondent, proposed to cross-examine her.

Holl objected.

THE JUDGE ORDINARY. The husband cannot choose his own mode of controverting the allegations in the petition for alimony. By the Rules of the Court (1) he is bound, if he wishes to controvert them, to file an answer on oath. As he has not chosen to take that course, he cannot be allowed to cross-examine the petitioner or contradict her evidence.

One-fifth of the income proved by the petitioner was accordingly allotted as alimony pendente lite.

Attorneys for petitioner: *Miller & Miller.*

Attorneys for respondent: *Eyre & Co.*

(1) Rule 84.

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Nov. 30.

IN THE GOODS OF HARRIET CROFTS.

Will of Married Woman—Not re-published on Death of Husband—Probate—Extent of Limitation.

By a post-nuptial settlement an annuity for life was granted to the deceased, her executors, administrators, and assigns, by her husband. The parties afterwards separated, and a decree dissolving the marriage by reason of the adultery of the husband was obtained in a Scotch court. Such decree, however, was ineffectual in this country, as the marriage had been celebrated in England, and the parties domiciled here. Subsequently the husband died. After the decree made in Scotland, and before the death of her husband, the deceased executed a will, in which she expressed an intention to dispose of her separate property only. This will was not republished after the death of the husband, and the deceased made no other will. Probate was granted to the executor, limited to such property as he in his affidavit should state he believed to form part of the separate estate of the deceased.

HARRIET CROFTS, late of Stanley Street, Pimlico, widow, died on the 11th of March, 1869. She was an Englishwoman by birth, and was married in London to Robert Crofts in the year 1831, and continued to live with him in London until the year 1838, when he left her and went to Edinburgh, and they never afterwards lived together. On the 21st and 22nd of September, 1837, indentures of settlement were executed by Mr. and Mrs. Crofts and trustees, whereby Mr. Crofts settled upon his wife, her executors, administrators, and assigns, an annuity of 150*l.* for life. In the year 1840, Mrs. Crofts, then resident in Ebury Street, Pimlico, instituted a suit against her husband in the usual court at Edinburgh by reason of his adultery in Scotland, and obtained a decree of divorce, which declared the husband to have forfeited all the rights of a lawful husband, and authorized the applicant to marry any free person. Before this decree was made, Mr. Crofts had left Edinburgh and returned to England, where he continued to reside until his death on the 21st of July, 1868.

On the 22nd of June, 1868, Mrs. Crofts executed a will, in which she appointed John McDole and William George Houlton executors. This will commenced: "This is the last will and testament of me, Harriet Crofts, of No. 30, Stanley Street, Pimlico, in the county of Middlesex, wife of Robert Crofts, of, &c.: Whereas I am

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possessed, as my separate property independent of my said husband, of certain personal property, namely, in the Consolidated £3 per Cent. Annuities Bank of England, which I am entitled to dispose of by will. Now, in exercise of the said power vested in me, I hereby dispose of the same in the following manner." After giving several legacies, she continued: "I give and bequeath to Frederick Hay, of &c., my two shares in the Grosvenor Hotel Company." The residue of her property the deceased left to Louisa Maria McDole, the wife of John McDole the executor.

The deceased did not re-execute this will after the death of her husband. The estate of the deceased consisted of household furniture and effects, and money in the funds, together of the value of about 800*l.*, part of which arose from savings out of her annuity, and part from a legacy which was paid to her after the date of the Scotch decree.

Nov. 23. *Dr. Spinks, Q.C.*, moved for probate of the will of the deceased to be granted to the executors therein named. He submitted that as the whole property was made up from the savings of the annuity, and of the legacy which was paid to the deceased after the date of the Scotch decree, and which was therefore separate estate, the executors were entitled to a general grant. He referred to *Haddon* v. *Fladgate.* (1)

Nov. 30. LORD PENZANCE. This case stood over in order that I might consider in what form probate should issue. I think it should be limited to such property as belonged to the deceased's separate estate; and that the applicant should file an affidavit stating, on his information and belief, of what such separate estate consisted.

Proctors: *Heales & Son.*

(1) 1 Sw. & Tr. 48; 27 L. J. (P. M. & A.) 21.

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Nov. 16.

SMITH *v.* FLETCHER.

Testamentary Suit—Revocation of Probate—Widow—Costs.

The defendant, widow of the deceased, twelve months after the death of her husband, who died in Canada, took probate of a will in which she was named executrix. A month afterwards a citation was extracted by the plaintiff calling upon the defendant to bring such probate into the registry, which she did. The plaintiff then propounded a later will, and after a short delay the defendant withdrew from the suit.

The Court declined to condemn her in the costs.

Thomas Fletcher, late of Iroquois, county Dundas, and province of Ontario, Canada, died on the 13th of May, 1868. On the 14th of June, 1869, probate of a will of the deceased, bearing date the 23rd of October, 1865, was granted to the defendant, Hannah Fletcher, the widow of the deceased, and the executrix named in such will. On the 31st of July, 1869, a citation issued from the Court of Probate at the instance of Mark Smith, as attorney for James Aspinall, the sole executor appointed by a will of the deceased, bearing date the 2nd of May, 1868, calling upon the defendant to bring in the probate obtained by her. On the 10th of August the defendant appeared, and brought in the probate. On the 22nd of September, 1869, the plaintiff filed his declaration, propounding the will of the deceased, dated the 2nd of May, 1868, and on the 14th of October the defendant gave notice to the plaintiff that she proceeded no further in the cause.

Dr. Swabey moved the Court to revoke the probate granted to the defendant, and to condemn her in the costs of these proceedings.

Inderwick, for the defendant, contended that, as widow, she had a right to put the plaintiff to proof of the will without liability to costs. She had withdrawn from the cause as soon as she was satisfied that the will was a genuine document.

The Court ordered the contentious proceedings to be stayed, but refused to make any order as to costs.

Attorneys for plaintiff: *Edwards, Layton, & Jacques.*
Proctor for defendant: *A. Ayrton.*

IN THE GOODS OF ELVIRA LOUISA COOPER. 1869 Nov. 25.

Will—Executor out of Jurisdiction—Small Estate—Administration with Will annexed—20 & 21 Vict. c. 77, s. 73.

The deceased executed a will in which she appointed an executor who subsequently became bankrupt, and left this country for Australia. The property being small, on the consent of the next of kin the Court granted administration with the will annexed to one of the parties interested under it, by virtue of the authority given by 20 & 21 Vict. c. 77, s. 73.

ELVIRA LOUISA COOPER, of Bernard Street, Russell Square, Middlesex, died on the 3rd of August, 1869, having made a will bearing date the 22nd of July, 1865, in which she appointed John Johnson sole executor. By this will she bequeathed 100*l.* to her mother, and the remainder of all other moneys, after payment of the funeral and testamentary expenses, to her sisters Rosina Mary Cooper, Henrietta Sophia Reakes, Eliza Harriet Cooper, and Alice Grace Cooper; and to Alice Grace Cooper she left all her wearing apparel, books, plate, jewelry, pictures, and household furniture. The value of the estate of the deceased is under 300*l.* John Johnson, on the 28th of December, 1866, executed an assignment of his property for the benefit of his creditors, and on the 23rd of December, 1868, he was adjudicated a bankrupt. In January, 1869, he left this country for Australia, and is now supposed to be at Ballarat, in the colony of Victoria, and is not expected to return to England.

Searle moved for administration with the will annexed to be granted under the 73rd section of the Probate Act, 1857 (20 & 21 Vict. c. 77), to Miss A. G. Cooper, one of the parties interested in the will. The special circumstances in this case are, that the property is small, and that the executor is not only absent from the country, but a bankrupt.

LORD PENZANCE. You must file a written consent from the next of kin who are entitled to the undisposed of residue, and then a grant of administration of all and singular the goods of the deceased may issue to the applicant under the 73rd section of the

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IN THE GOODS OF COOPER.

Probate Act, 1857. This will not prevent the absent executor from claiming the probate, on his return to this country, if so minded.

Attorneys: *Benham & Tindall.*

Dec. 21.

IN THE GOODS OF JOHN PORTER.

Will—Conditional—Dispositions dependent on an event.

The deceased executed a paper, in which he made use of the following language: "Being obliged to leave England to join my regiment in China, I leave this paper containing my wishes. Should anything unfortunately happen to me whilst abroad, I wish everything that I may be in possession of at that time, or anything appertaining to me hereafter, to be divided," &c. The deceased returned to England from China:—

Held, that the dispositions of the will were dependent upon the death of the deceased in China, and that therefore the will itself was conditional.

JOHN PORTER, of Berkeley Gardens, Kensington, died on the 9th of October, 1869, a widower, leaving Florence Charlotte Anne Porter, and Ellen Constance Porter, aged respectively sixteen and fourteen years, his only children and next of kin. His property was in value about 5000*l.*

The deceased became a widower in June, 1862, and on the 25th of September, 1862, he executed a will in the following terms:— "Being obliged to leave England to join my regiment in China, and not having time to make a will, I leave this paper containing my wishes and desires. Should anything unfortunately happen to me while abroad, I wish everything that I may be in possession of at that time or anything appertaining to me hereafter, whether in lands, goods, clothes, chattels, or money, to be equally divided between my two children, Florence Charlotte Anne Porter, and Ellen Constance Porter, share and share alike; and should either of them die the survivor to inherit the whole. And I wish their grandmother, Mrs. Mary S. Perch, and their uncle, William Perch, to be their joint trustees and guardians, both of persons and property; and should they attain a marriageable age, the said property to be settled on each of them for their own use and benefit by

their said trustees; and should either of the trustees die, then whom they may approve shall be appointed in their stead."

Immediately after the execution of the will he delivered it to Mrs. Perch, in whose custody it remained until after the death of the deceased. Colonel Porter left England for China to join his regiment then on service in that country in October, 1862, and returned to England in 1863. Mrs. Perch frequently requested him, after his return to England, to have a more formal will made by a solicitor, but he refused, saying that he had only two daughters, who would be his co-heiresses, and he thought what he had done would be sufficient.

C. A. Middleton moved the Court to decree probate of the will. The Court always leans towards a construction favourable to the validity of a will. As the testator refers to property which he may have at any time, and not to such property only as he had when he went abroad, he must have intended that his will should have a general application, and not that it should have an operation conditional on his dying in China. He referred to the cases of *In the Goods of Thorne* (1), and *In the Goods of Dobson.* (2)

LORD PENZANCE. I am obliged very reluctantly to refuse this application, but it is open to the parties to propound the will if they think proper. The Court is bound to hold that this will is conditional. Looking at the cases already decided, and the principles therein laid down as to contingent wills, I find a distinction drawn. It is the common feature of wills in respect of which this sort of question arises, that the testator therein refers to a possible impending calamity in connection with his will; and the question arises, whether he intends to limit the operation of the will to the time during which such calamity is imminent. If the language used by him can by any reasonable interpretation be construed to mean that he refers to the calamity and the period of time during which it may happen, as the reason for making a will, then the will is not conditional; but if he refers to the calamity or the possible occurrence of some event as a reason for

(1) 4 Sw. & Tr. 36; 34 L. J. (P. M. & A.) 131.
(2) Law Rep. 1 P. & M. 88.

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a certain disposition of his property, and mixes up the disposition of the property with the event so that one is dependent on the other, then the Court must hold the will to be conditional.

I must now determine within which class this will falls. In *Roberts* v. *Roberts* (1) the disposition of property was only to take effect on the happening of an event, which did not happen, and the will was held by Sir C. Creswell to be conditional. In *Thorne's Case* (2) the will was in these terms: "I request that in the event of my death while serving in this horrid climate, or any accident happening to me, I leave and bequeath," &c. That case is the strongest in favour of the present application. The fact was, that although the testator did not die on the Gold Coast, his health was destroyed during his service there, and he was sent home invalided in time to die; and the Court thought it was not necessary to limit the operation of the will to the event of death on the Gold Coast.

There are two later cases in which the Court held that the wills were not conditional, but in both of those the language used could fairly be referred to an intention on the part of the testator to give a reason for making a will, and nothing more. In *Dobson's Case* (3) the words were: "In case of any fatal accident happening to me, being about to travel by railway, I hereby leave," &c. The event, the danger of railway travelling, is given as a reason for making a will. In *Martin's Case* (4) the words were: "I, being physically weak in health, have obtained permission to cease from all duty for a few days, and I wish during such time to be removed from the brig *Appellina* to the floating hospital ship *Berwick Walls*, in order to recruit my health; and in the event of my death occurring during such time, I do hereby will and bequeath," &c. Here again an event, the probability of death, is given as a reason for making a will.

The question then is, whether the paper before me comes within the principle of these cases. I think it does not. If it had stopped at the end of the first sentence, I think it would have come within it. "Being obliged to leave England to join my regiment . . . should anything unfortunately happen to me

(1) 2 Sw. & Tr. 337; 31 L. J. (P. M. & A.) 46.
(2) 4 Sw. & Tr. 36; 34 L. J. (P. M. & A.) 131.
(3) Law Rep. 1 P. & M. 88.
(4) Law Rep. 1 P. & M. 380.

whilst abroad;" but the testator goes on to say, "I wish everything that I may be in possession of *at that time*, to be divided," &c. At what time? His death whilst abroad; and the very disposition he speaks of, is to take effect only at the time of his death abroad. It is said that the following words, "or anything appertaining to me hereafter," enlarges the operation of the will. I do not think they do. The testator's meaning is, "everything I have in my possession at the time of my death abroad," is to be disposed of in a certain way; and, furthermore, "anything that may come to me after my death," that is, any reversionary interest. "At that time" limits the disposing part of the will to the period of time during which a certain event might happen, namely, his death abroad. I cannot hold the will to be otherwise than contingent, and I refuse the application.

Attorney: *A Blake.*

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Nov. 17.

Desertion—Deed of Separation.

A husband deserted his wife, but within two years from the desertion a deed of separation was agreed to, by which he covenanted to make her an allowance and to charge it upon his reversionary interest in a sum of money. This deed was executed by the husband and wife, and by a trustee on behalf of the wife, but no part of the allowance had been paid:—

Held, that the wife had bargained away her right to relief, and could not establish a charge of desertion without cause for two years.

Nott v. *Nott* (Law Rep. 1 P. & M. 251) distinguished.

PETITION by a wife for dissolution on the ground of adultery, coupled with desertion without cause for two years and upwards.

No appearance by the husband.

They were married in July, 1861, and lived together until 1865. The husband was formerly an officer in the army and had sold out. He deserted his wife in 1865, and from that time until the case came on for hearing was cohabiting with another woman. Shortly after the desertion, through the interposition of a mutual friend, a deed of separation was drawn up by which he covenanted to make her an allowance, which was charged upon his reversionary interest in a sum of 5000*l.*, and she agreed to live separate

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and apart from him. This deed, dated the 16th of April, 1866, was executed by the husband and wife, and by a trustee on behalf of the wife. The husband had never paid any part of the allowance, and never contributed to her maintenance.

Dr. Swabey, for the petitioner. The deed of separation was entered into by the wife simply for the purpose of obtaining a maintenance, and not because she consented to live apart from the husband.

[THE JUDGE ORDINARY. Is it not a similar case to *Crabb* v. *Crabb?* (1).]

The petitioner has never derived any advantage from the deed, and it has never yet been acted on. The case is therefore within the decision in *Nott* v. *Nott*. (2)

THE JUDGE ORDINARY. The Court is satisfied as to the adultery, but the question is, whether it is justified in holding that there has been desertion without cause for two years. No doubt the husband left the wife in 1865 under such circumstances that if he had never seen her again, and no communication had passed between them, for two years, the desertion would have been complete. But in 1866, Mr. Paine, a trustee under certain family deeds, and a friend both of the husband and of the wife, went to the husband and remonstrated with him for having left his wife, and discussed with him the question of making some provision for her. The result of his negotiations was that the husband and wife entered into a deed, by which he covenanted to pay her 150*l.* a year. That deed was fully and completely executed, and was signed by the husband and the wife and the trustee. The husband had not the means of paying the money, but he had a reversionary interest in 5000*l.*, and it was covenanted that the allowance should be made a charge on that reversion. The wife therefore obtained a distinct benefit under the deed, having a charge upon the reversion for the allowance, upon which she might raise money. She on her part agreed that she would live separate from her husband.

It is now suggested that the Court should inquire into what was

(1) Law Rep. 1 P. & M. 601. (2) Law Rep. 1 P. & M. 251.

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intended by her when she executed the deed. It is clear that such evidence cannot be admitted. The question then is, whether a woman who voluntarily enters into an agreement that her husband shall live apart from her, can be said to have been deserted without just cause. I repeat the opinion I formed in *Crabb* v. *Crabb* (1), that she cannot. There is a material difference between such a case as this and *Nott* v. *Nott*. (2) The ratio decidendi in *Nott* v. *Nott* (2) was, that the wife never agreed to live separate and apart from the husband. The making of a deed was contemplated, and some of the parties executed it, but the party whose execution was to make it an efficient and binding agreement was the trustee who covenanted for the wife, and he never signed it, so that the deed was never completed. In this case the Court is reluctantly obliged to hold that the wife has bargained away her right to relief on the ground of desertion, and that the charge of desertion without cause for two years is not established. She is entitled to a judicial separation on the ground of adultery, if she applies for it.

The case was adjourned in order that the petitioner might be consulted. (3)

Attorneys for petitioner: *Chippenden, Clarke, & Turner.*

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Dec. 7.

Suit for Dissolution of Marriage—Desertion and Adultery—Desertion not proved —Subsequent Amendment of Petition—Charge of Cruelty added—Practice.

The wife petitioned the Court for a dissolution of marriage by reason of her husband's adultery, coupled with desertion. At the hearing, the Court held that the desertion was not proved, and adjourned the final decision in order that the petitioner might consider whether she would accept a judicial separation. Subsequently, the Court allowed her to amend her petition by adding a charge of cruelty, being satisfied from the affidavits that until the hearing she was ignorant that the acts she could prove against her husband amounted to legal cruelty.

MRS. PARKINSON petitioned the Court for a dissolution of her marriage by reason of her husband's adultery, coupled with desertion. The husband did not answer the petition.

(1) Law Rep. 1 P. & M. 601. (2) Law Rep. 1 P. & M. 251.

(3) See next case.

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On the 17th of November, 1869, the petition came on for hearing before the Judge Ordinary, when the adultery was proved; but, by reason of a deed of separation which had been entered into by the petitioner, the Court held that the charge of desertion failed, and allowed the matter to stand over in order that the petitioner might consider whether she would have a decree of separation made against her husband. (1)

Upon the part of the petitioner, affidavits were now filed, from which it appeared that about two or three months after her marriage in 1861, whilst cohabiting with her husband in New Zealand, she became very ill, and was attended by one of the surgeons of her husband's regiment. That she continued very ill for five or six months, and that her health has suffered ever since; but that she was never told the nature of her illness until September last. That Dr. Connolly, who was then in attendance upon her, having had his suspicions aroused by the nature of her symptoms, questioned her as to any complaint she might have previously had which would account for the condition of her nose and throat, and on her telling him of her previous illness, he informed her she was then and still is suffering from syphilis. That up to that time Mrs. Parkinson had no knowledge of the symptoms of syphilis, or of the nature of the disease, and that she was entirely ignorant that the wilful communication of such a disease by her husband was legal cruelty, until she accidentally learnt that it was so from hearing the trial of a case in this Court whilst waiting for her own petition to be disposed of, and on the following day, the 18th of November, she for the first time informed her solicitor of these facts.

Dr. Swabey moved the Court to allow the petitioner to amend her petition by adding a charge of cruelty against the respondent.

THE JUDGE ORDINARY was of opinion that the amendment might be made, as the facts were shewn to be noviter perventa, but the petition must be re-served upon the respondent.

Attorneys for petitioner: *Chippenden, Clarke, & Turner.*

(1) See ante, p. 25.

HEBBLETHWAITE *v.* HEBBLETHWAITE; THE QUEEN'S PROCTOR INTERVENING. 1869 *Dec.* 18.

Evidence of Adultery—Witness not liable to be Asked or bound to Answer Questions—Evidence—Evidence Further Amendment Act, 1869.

A witness who is called to prove adultery with one of the parties to a suit may claim the protection of the proviso in s. 3 of 32 & 33 Vict. c. 68, and the judge will not allow such witness to be interrogated on the subject of his or her adultery; but unless the protection of the proviso is claimed by the witness, the evidence is admissible, and it is not competent to counsel for either party to exclude it.

THIS was originally a petition by a wife for a dissolution of marriage on the ground of the husband's adultery and cruelty. The husband denied these charges, and alleged that the petitioner had been guilty of adultery, and prayed for a dissolution of marriage on that ground. When the case came on for hearing no evidence was produced on behalf of the petitioner, but the respondent proved the allegations in his answer, and thereupon a decree nisi was pronounced on the ground of the wife's adultery. Before the decree was made absolute the Queen's Proctor intervened, and alleged, inter alia, that the husband had committed adultery with one Clara Philips. The husband traversed the Queen's Proctor's allegations.

The cause came on for hearing before the Judge Ordinary and a special jury.

Sir R. Collier, A. G. (*J. F. Collier* with him), for the Queen's Proctor, called Clara Philips as a witness.

Dr. Spinks, Q.C. (*Inderwick* with him), for Mr. Hebblethwaite, objected to any question being put to the witness tending to shew that she had committed adultery with Mr. Hebblethwaite. The words of the statute (32 & 33 Vict. c. 68) are precise and clear. (1)

(1) 32 & 33 Vict. c. 68, s. 3, enacts that "the parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

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It is not only that she is not bound to answer, but that she is not liable to be asked such a question.

Sir R. Collier, A. G. It is for the witness and not for the other side to take the objection. The witness may, if she pleases, claim the protection of the proviso; but the intention of the statute is, that a witness, not being a party to the suit, may give evidence as to adultery if he or she pleases, but is not bound to answer any question as to adultery if unwilling to do so.

Dr. Spinks, in reply. The words of the proviso admit of no doubt. The probable intention was to protect the witness from the inference of guilt which would be drawn from a refusal to answer. According to the other construction, the words "no witness shall be liable to be asked" are surplusage.

THE JUDGE ORDINARY. I am very clear as to the intention of the legislature, although I cannot say that the language they have used is not capable of the interpretation put on it by Dr. Spinks. The general intention was to protect the witnesses whose evidence was rendered admissible by the statute. The provision was not intended to apply to the evidence by which the case of either side was supported independent of the evidence of the parties; it was not intended to narrow the sources of evidence for or against a petitioner or respondent, but to protect the witnesses; and I doubt whether it is competent to any counsel in a case to take advantage of it. It is the duty of the judge to see that the witnesses have the protection given them by the statute. What is the meaning of the words, "No witness shall be liable to be asked or bound to answer?" They clearly refer to the position of the witness. The meaning is this. When a person is called into the witness box, and it is proposed to question that witness for the purpose of obtaining a statement that he or she has been guilty of adultery, the witness may claim the protection of the statute, and say that he or she is not desirous of being interrogated on the subject. I think that the words "no witness shall be liable to be asked" are not surplusage, because without those words a string of questions might be put one after the other to a witness who would have to refuse to answer them one by one, whereas the use of those words makes it the duty of the judge to refuse to allow any of the questions

to be put as soon as the witness claims the protection of the statute. 1869

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THE JUDGE ORDINARY told the witness that she was not bound to answer any question as to her alleged adultery with Mr. Hebblethwaite, unless she pleased; but she said she had no objection to give evidence, and she was accordingly examined.

The jury found that Mr. Hebblethwaite was not guilty of the adultery charged, and on a subsequent day the decree nisi which he had obtained was made absolute.

Attorney for Mr. Hebblethwaite: *J. C. Dalton.*

KELLY *v.* KELLY. Dec. 7.

Judicial Separation—Cruelty—Undue Exercise of Marital Authority.

If force, whether physical or moral, is systematically exerted to compel the submission of a wife, in such a manner, to such a degree, and during such a length of time, as to injure her health and render a serious malady imminent, it is legal cruelty, and she will be entitled to a judicial separation.

2 Sw. & Tr. 59 R.

THIS was a suit for judicial separation instituted by Mrs. Frances Kelly, by reason of the cruelty of her husband, the Rev. James Kelly, the incumbent of St. George's Church, Liverpool.

The respondent filed a very long statement as an answer, in which, in effect, he denied he had been guilty of cruelty, and stated that in anything he had done he had only acted in the legitimate assertion of his marital rights. The marriage took place in 1841. The only child, a son, was born in 1845; and the parties ceased to cohabit in January, 1869.

The petition was before the Court on the 19th, 20th, 24th, 25th, 26th, and 27th of November; and the Judge Ordinary took time to consider his decision.

Dr. Deane, Q.C., and *Inderwick*, appeared for the petitioner.
Mr. Kelly conducted his own defence.

Dec. 7. THE JUDGE ORDINARY. The peculiar and distinguishing

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feature of this case is the adoption by the respondent of a deliberate system of conduct towards his wife with the view of bending her to his authority. A man who sets about to achieve this end by purposely rendering a woman's daily life unhappy, is in danger of overstepping his rights, as he is pretty sure to fall short of his duties. The respondent in this case has, in my judgment, done both. Without disparaging the just and paramount authority of a husband, it may be safely asserted that a wife is not a domestic slave, to be driven at all cost, short of personal violence, into compliance with her husband's demands. And if force, whether physical or moral, is systematically exerted for this purpose, in such a manner, to such a degree, and during such length of time, as to break down her health and render serious malady imminent, the interference of the law cannot be justly withheld by any court which affects to have charge of the wife's personal safety.

In cases of this kind everything depends on degree. Many acts which are venial in themselves become reprehensible when they take their places as parts of a system. Others, justifiable on occasions, lose their justification when continuously and purposely repeated. In considering a charge of cruelty, therefore, the conduct of the party inculpated can only be justified, or the reverse, as a whole. And if, upon a general review, the Matrimonial Court is of deliberate opinion that cohabitation could not be resumed with safety to the wife, it is bound by the dictates of common sense, as well as upon principles repeatedly avowed and acted upon in a long series of decisions, to step in and forbid its resumption. No doubt, in cases such as the present, where the personal violence used is of a trifling character, it behoves the Court to be sedulous in inquiry and slow in conviction. It should be entirely satisfied that the conclusion of the wife's danger is clearly reached, and on reliable evidence. Moreover, the decisions of my predecessors have imported this further proposition as a condition of the Court's interference, that the troubles of the wife are not owing to her own misconduct. "If," said the Court, in *Dysart* v. *Dysart* (1), "a wife can ensure her own safety by lawful obedience, and by a proper self command, she has no right to come here, for this Court

(1) 1 Rob. 140.

affords its aid only where the necessity for its interference is absolutely proved." I do not stop to inquire how far this last proposition would stand the test of cases that might possibly arise in which the safety of a weak, misguided, infirm woman, incapable of self command, might be gravely imperilled by continued cohabitation. For the decision of this case I fully adopt this condition, and, setting out on the above principles, I proceed to inquire what has Mrs. Kelly suffered; from what causes; and with what result upon her health?

There is little variance or dispute about the leading facts. Towards the close of the year 1867 Mr. Kelly informed his wife that a sum of 5000*l.*, which had been bequeathed to her by her sister, had been in great part lost by the investment he had made of it. Unable to obtain from her husband a clear idea of her rights, and those of her son, under her sister's will, she wrote to her brother-in-law, Colonel Thornbury, to see the will for her, and to explain it. This he did, and wrote her the result, telling her that the money was in law at the entire command of her husband, and that her son had no rights in the matter. Some further correspondence passed between the petitioner and Colonel Thornbury, and between the petitioner and her brother. These letters falling into the hands of the respondent, were vehemently resented by him, and were, directly or indirectly, the cause of much, if not most, that followed. About the same time the petitioner's son quarrelled with his father, and was obliged to quit the house. The petitioner, to some extent, took the son's part, which increased the resentment of the respondent. From these circumstances the respondent took up the idea, which he afterwards allowed to fill his whole mind, that his wife was plotting and conspiring against him. He commenced opening her letters, and calling her a vile traitor and apostate. He told her that no modest woman would associate with her more than with a prostitute. That she had given her confidence to another man, &c. He refused to sit at meals with her; he insisted on occupying a separate bedroom; he told the servant to take orders from him, and not from his wife; he forbad her to visit the poor in the district, as she had been accustomed, and desired her not to attend the ministration of the sacrament. Some months passed in this way. The respondent

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kept apart from his wife all day, except at family prayers, and even then he appears to have had little or no communication with her, except in the way of rebuke and reproach. At length, in the month of May, 1868, the petitioner became ill, her appetite wholly failed, she lost the senses of taste and smell, and towards the end of that month felt a sensation of numbness in her arm, which gave reason to fear paralysis. She consulted Dr. Drysdale. He advised her to leave home; her husband refused; and, on the 29th of June, having become worse, she left her home without his consent.

I am satisfied, from the medical testimony, that at this time the occurrences which had taken place, and the isolation and reproaches to which she had been subjected, had so preyed upon her nervous system and general health, that serious consequences were to be feared if she were not for a time withdrawn from the life she was leading. Mrs. Kelly stayed away nearly four months, which she passed with her relations. The respondent wrote her many letters, in which he enlarged upon her sin. He expressed no care for her health, and none that she should return. In October she returned; between that time and the January following (when she finally left home) she was purposely subjected to the following treatment. She was entirely deposed from her natural position as mistress of her husband's house; she was debarred the use of money entirely; not only were the household expenses withdrawn from her control, but she was not permitted to disburse anything for her own necessary expenses; every article of dress, every trifle that she required had to be put down on paper, and her husband provided it, if he thought proper. Having refused, on one occasion of going into the town, to tell her husband every where that she had been, an interdict was placed on her going out at will. At one time the doors were locked to keep her in; at another, a man servant was deputed to follow her; at another, the respondent insisted on accompanying her himself, whenever she wished to go abroad. On these occasions he appears to have occupied the short time they were together in, what he called, putting her sin before her, in strong, coarse, and abusive terms, applying to her the same epithets and language as would be applicable to a woman who had been guilty of adultery. He took no meals with her; he occupied

a separate bed-room; he passed no portion of the day, however small, in her society. They met, as before, only at family prayers, and if he spoke to her at all, it was only to give some directions or to reproach her. Save on one or two occasions she saw no one. Those whom she desired to see were forbidden the house. She was absolutely prohibited from writing any letters, unless her husband saw them before they were posted. She was thus, as far as the respondent could achieve it, practically isolated from her friends. Meanwhile the care of the household was confided to a woman hired for the purpose, who was directed not to obey Mrs. Kelly's orders without the respondent's directions. In short, she was treated like a child or a lunatic, and in this light she was actually regarded by the woman just mentioned when she first entered the service, and this, be it remembered, although she had passed the mature age of sixty years, and had been married to the respondent for seven and twenty years. With no occupation, debarred the society of her husband and son at home, and that of her friends abroad, withheld from the performance of her household duties, subordinated to servants, penniless, and so far as her husband could effect it, friendless, the daily life of this lady was little better than an imprisonment, the solitary silence of which was broken only by the language of harsh rebuke, foul words, and epithets of insult, indignity, and shame. What wonder that, under so grievous an oppression, her health again gave way? She could not eat; she hardly slept at all; she was subject to constant trembling and fainting; she awoke involuntarily screaming at night, and her nervous system was so shattered that the medical witnesses declared paralysis or even madness to be imminent. Now, upon this testimony, it is important to observe that there is no contradiction. The respondent did not, even upon his own oath, deny or qualify the petitioner's evidence as to her state of health. On this head (the most important in the whole case) the respondent confined himself to the suggestion that the miserable condition was brought about, not by his treatment, but by vexation at the discovery of her own treachery. Her actual condition and danger he did not call in question, and yet it is to a repetition of this treatment with its almost inevitable results, that the respondent expects this Court to order Mrs. Kelly's return. That it should be asked to break in

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upon his rights as a husband, by depriving him of his wife's society, or, I should rather say, of her presence under his roof, is to him a matter of surprise and indignation. For, as he has truly said, he has not beaten her. He has, indeed, on two or three occasions, made her feel that his superior physical strength was always ready to be exerted to constrain her movements, but he has inflicted no bruises, and done no visible bodily injury. Such a view of the law, if correct, would be little to its credit, and to coincide with it would be to abrogate the first duty in these matters of the Matrimonial Court, the protection of the wife's health and safety. These, then, are the things which Mr. Kelly did, and these the results upon his wife's health.

The remaining question is, why did he do them? His answer, I believe, would be, to bring his wife to penitence and submission. But penitence for what? and submission to what? Although he has never in his numerous letters, so far as I can discover, stated with great clearness what it was that he wished her to do, it is I think to be sufficiently gathered from them that he desired her to admit that she had suspected him of fraud and had traitorously conspired with others to fasten that charge upon him. For this he would have her express remorse and contrition, suing for his pardon, and humbly confessing her guilt. Mrs. Kelly refused to do so, because she says she never had, in fact, suspected him of anything false and dishonourable, and never did take counsel with others to bring the charge of it against him. Writing on the 1st of August, 1868, she says, "I could not tell a lie in this matter. I did not design any treachery, and will never say I did." And further on, "I am sorry I did not ask your leave to see the will. I had a right to do so, but had I at all thought of its vexing you I would not have acted as I did. Surely, now that what has taken place cannot be recalled, it would be better to bury the past in oblivion; let bygones be bygones, forgive and forget mutually, and seek to spend the little time that remains of this life on earth together in peace. . . . I promise on my part to do all in my power towards this object, but my position must be such as not to cause a scandal. . . . If you will not do this, will you tell me what you do wish, and what is to be the end of it." Writing again on the 14th of September, 1868, she said: "I

never thought you had done anything dishonourable, and certainly I never tried to prove it. . . . You are under a complete delusion as to my conduct . . . My desire is to act towards you with the submission, obedience, and even affection of a wife."

It would be difficult for a wife to play her part in so critical and painful a situation in a more becoming manner. Surely, such language as this should have satisfied any reasonable man. It did not satisfy Mr. Kelly, because, as it appears to me, he had suffered his mind to become filled and mastered by notions utterly extravagant, both as to the authority of a husband, and the legitimate means of enforcing it. He invokes the theory of the law, that the wife should be subject to the husband, but he forgets to add the qualification, "in all things reasonable." He asserts that he is within the law, if refraining from physical violence, he only puts such pressure on his wife as shall force her to obey him. But again he should add, "provided the means used to exert moral pressure be reasonable." But what if reasonable means are insufficient, and a wife still holds out against her husband's lawful will? The answer is, that the law can neither do nor sanction more. The law, no doubt, recognizes the husband as the ruler, protector, and guide of his wife; it makes him master of her pecuniary resources; it gives him, within legal limits, the control of her person; it withdraws civil rights and remedies from her, save in his name. Conversely, the law places on the husband the duty of maintaining his wife, relieves her from all civil responsibility, and excuses her even in the commission of great crimes, when acting under her husband's order. By these incidental means, it has fenced about and fostered the reasonable supremacy of the man in the institution of marriage. In so doing, it is thought by some that the law is acting in conformity with the dictates of nature, and the mutual characteristics of the sexes. Be that as it may, the subordination of the wife is doubtless in conformity with the established habits and customs of mankind. With all these advantages then in his favour, the law leaves the husband, by his own conduct and bearing, to secure and retain in his wife the only submission worth having, that which is willingly and cheerfully rendered. And if he fail, this Court cannot recognize his failure as a justification for a system of treatment by which he places his

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wife's permanent health in jeopardy, and sets at nought not only his own obligations in matrimony, but the very ends of matrimony itself, by rendering impossible the offices of domestic intercourse and the reciprocal duties of married life. The cruelty of the respondent is established, and the Court decrees a judicial separation with costs.

Attorneys for petitioner: *Gregory & Co.*

Dec. 21.

RAYSON AND WIFE *v.* PARTON AND OTHERS.

Testamentary Suit—Will pronounced against—Heir at law an Intervener although not cited—Costs.

In a testamentary suit between the executor of a will and one of the next of kin, the heir-at law, although not cited, intervened, and the jury found that the deceased was not capable of executing a will at the time the will propounded bore date, and that he did not know and approve of its contents. On the issues of undue influence and fraud they decided in favour of the executors. The Court condemned the parties propounding the will in the whole costs of the next of kin and of the intervener.

CHARLES JOHNSON, late of High Street, Sheerness, Kent, died on the 3rd of February, 1868. Joseph Kingsworth Parton and William Page, the defendants, as executors, propounded a will of the deceased bearing date the 20th of March, 1867. The plaintiff, Mrs. Rayson, one of the next of kin, pleaded that the will propounded was not duly executed by the deceased, that it was obtained by the undue influence and fraud of the defendants Parton and Page; that the deceased was not capable of executing a will on the day it bears date, and that he did not know and approve of its contents. Subsequently Charles Johnson, the heir at law of the deceased, although not cited, obtained leave to intervene by his guardian (he being an infant), and it was pleaded on his behalf that the will was not duly executed, that the deceased was not, in March, 1867, competent to execute a will, and that he did not know and approve of its contents. Notice was also given for him that he only intended to cross-examine the witnesses produced by the executors. The cause was heard before the Court and a special jury on December 10th, 11th, 15th, and 16th.

Sir J. Karslake, Q.C., *M'Intyre*, and *Bayford*, appeared for the executors.

Parry, Serjt., *Inderwick*, and *Turner*, appeared for the plaintiffs.

M. Chambers, Q.C., and *Searle*, for the intervener.

The jury found that the deceased was not of sound mind, memory, and understanding, on the day the will propounded bears date, and that he did not know and approve of its contents, and they negatived the charges of undue influence and fraud. The Court, on the 17th of December, pronounced against the will, revoked the probate theretofore granted to Messrs. Parton and Page, and condemned them in the costs of the suit, but granted to them leave to shew cause why they should not pay the costs of the intervener.

Dec. 21. *Bayford*, for the executors, contended that on the issues of undue influence and fraud which had been found in their favour, they were entitled to be paid their costs by the next of kin. The exact amount of costs caused by those pleas could be determined on taxation by the registrar. As regards the intervener, the executors not having cited him it was quite unnecessary for him to have appeared, as the proceedings did not bind him. The costs were materially increased by the intervention, and the executors ought not to be liable to such increase.

LORD PENZANCE. If any substantial part of the evidence given on the issues which were found for the defendants had been different from that offered on the other issues, I would not have condemned them in the whole costs, but from my own recollection I can say that the whole mass of evidence was applicable to all the issues, and cannot be distinguished, and therefore that part of my decree will stand. As to the heir at law, it is said that he is a mere volunteer, and that the costs incurred by him in the suit were unnecessary. But that, I think, is not a fair view of the case. As he was not cited he was not bound to appear, and might have stood aside, and after the parties interested in the personalty had completed their litigation he might have had the whole matter tried over again. If he had done so the parties would have had to pay the costs of two proceedings. It would, certainly, be a bad

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example if I held that where an heir at law comes into litigation with the persons interested in the personalty so that there is only one proceeding at less expense to the suitors, he shall not have his costs when successful; whereas if he had not done so, and had taken other proceedings, he would have got them. What the intervener has done was most desirable for the parties, for they have carried on the contest at less expense than if he had taken proceedings in another form. They must, therefore, pay his costs.

Proctor for defendants: *W. G. Jennings.*
Proctor for intervener: *E. W. Crosse.*
Attorney for plaintiffs: *Sismey.*

Dec. 21.

IN THE GOODS OF FRASER.

Memorandum of Revocation—1 *Vict. c.* 26, *s.* 20—*Probate.*

At the foot of his will the deceased wrote a memorandum to the effect, "This will was cancelled this day;" and he duly executed such memorandum in the presence of two witnesses:—

Held, that such memorandum was not a will or codicil, but only a writing, which could not be admitted to probate.

THOMAS FRASER, of Bolton Street, Piccadilly, died on the 2nd of November, 1869, at Florence, in Italy, leaving a widow and two infant children entitled to his personal estate. On the 24th of July, 1866, he duly executed a will, in which he appointed William Bagley, Edward Nelson, and Hugh Fraser, executors. In the year 1869 he wrote at the foot of the will the following memorandum:—"Florence, October 19th, 1869. This will was cancelled this day, in the presence of Dr. Roderick Fraser, physician, and Margaret Riley, nurse, who witnessed the signature of Thomas Fraser, Esq., both being present, and signed it as witnesses." The names of Mr. Fraser and the witnesses appeared at the end of the memorandum. The deceased did not execute any other testamentary paper.

Dr. Tristram moved the Court to decree probate of the memo-

randum. The parties were anxious that the revocation should be recorded. He referred to the case of *In the Goods of A. Hicks.* (1)

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LORD PENZANCE. This case goes further than the one referred to. I had serious doubts in deciding that one, but I thought the memorandum in that case did, perhaps, do something more than merely revoke the will, while in this case it stops at a revocation. By the 20th section of the Wills Act it is enacted that a will or codicil may be revoked by another will or codicil duly executed, or by "some writing declaring an intention to revoke the same," and executed in the manner a will is theretofore required to be executed. There is a distinction, therefore, in this section, between a will or a codicil and *some writing*. I am clearly of opinion that this memorandum is merely *a writing*, and not a will or codicil. The deceased does nothing by it, in no way disposes of any property, he only revokes the paper to which it is attached. I must reject the motion.

Proctors: *Fielder & Sumner.*

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Jan. 25.

Testamentary Suit—Administrator pendente lite acting under Directions of Court of Chancery—Interference of Court of Probate—20 & 21 *Vict. c.* 77, *s.* 70.

An administrator pendente lite having been appointed by the Court of Probate, a suit was instituted in the Court of Chancery to administer the estate of the deceased, and an order made in such suit upon the administrator to sell certain property for the purpose of raising a fund to pay the debts due from the deceased's estate.

The Court of Probate refused to interfere and stop the sale so ordered by the Court of Chancery.

THIS was an administration suit in which the plaintiff and defendant are contesting the right to a grant of administration to the personal estate and effects of Dame Henriette Felicité Tichborne, deceased.

On the 22nd of June, 1869, an order was made by this Court appointing Richard Humphreys administrator pendente lite of the

(1) Law Rep. 1 P. & M. 683.

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goods of the deceased. (1) Subsequently a suit was instituted in the Court of Chancery, entitled *Morris* v. *Humphreys*, to administer the estate of the deceased, and on the 26th of July, 1869, an order was made in such suit by Vice-Chancellor Sir J. Stuart directing the usual inquiries to be made as to the debts owing by the deceased, and the amount of property belonging to her, and ordering that the personal estate should be applied in payment of such debts. The result of the inquiry was, that there was in the hands of the administrator a sum of 1034*l.* 3*s.* 7*d.*, and in his possession plate, jewellery, pictures, linen, and books, which constituted the whole personal estate of the deceased. On the other hand, the debts due and owing from the deceased's estate amounted to 1227*l.* 17*s.* 10*d.* exclusive of the costs and expenses properly chargeable against the estate as costs of administration, or otherwise relating to the estate. Thereupon Mr. Humphreys, in execution of his duty as administrator, and with the authority of the chief clerk to Vice-Chancellor Sir J. Stuart, gave notice of the sale of the before-mentioned plate, jewellery, &c., by auction on the 2nd of February, and such notice was inserted in the *Hampshire Chronicle* for the 8th of January, inst.

Dr. Tristram, for the plaintiff, moved the Court to order the sale to be stayed until further orders. The goods to be sold are chiefly articles of personal ornament and family relics which the plaintiff desires to retain. He is willing to pay 300*l.* into the registry to meet the claims intended to be provided for by the sale. The administrator is subject to the immediate control of this Court, and must act under its direction.

Sir J. Coleridge, S. G. (*Bayford* with him), for the administrator, opposed the motion. The creditors have a right to be paid their debts, and they cannot be so unless the sale proceeds, for the estate is insolvent. The administrator is acting under the order of the Court of Chancery in giving notice of a sale, and if this Court interferes it may lead to a conflict of jurisdiction.

LORD PENZANCE. The order for sale has been given by Mr. Humphreys as administrator pendente lite, and there is no doubt,

(1) Law Rep. 1 P. & M. 730.

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under s. 70 of the Probate Act, this Court has power to control and make orders upon an administrator pendente lite. But in this case, the relatives having squabbled as to who should be appointed administrator, the creditors have gone to the Court of Chancery, and have obtained an order for administration, and it is in that suit that the administrator is acting in giving notice for a sale. I do not think right to interfere with him. The proposal made seems to be reasonable if the sum offered is sufficient. It seems hard that the plaintiff cannot prevent the sale of the personal ornaments and family relics on paying in a sum of money sufficient to cover their value. I do not imagine that the forms of the Court of Chancery will prevent the plaintiff obtaining his end. However, I cannot interfere with the details of an administrator's proceedings where a suit is pending in the Court of Chancery, and the administrator is acting under the direction of that Court. I must reject the motion with costs.

Attorneys for plaintiff: *Walter & Moojen.*
Attorneys for administrator: *Dobinson & Geare.*

ROBERTSON *v.* SMITH AND LAWRENCE.

Feb. 15.

Codicil—Free Gift—Operation on Death.

A deceased duly executed a paper which commenced, "I hereby make a free gift to," &c. The Court admitted parol evidence to explain the intention of the deceased, and being satisfied therefrom that he intended the operation of such paper to be dependent on his death, granted probate of it as a codicil to the will of the deceased.

FREDERICK CRAVEN, late of St. John's Villas, Blackrock Lane, Holloway, died on the 8th of November, 1868, having duly executed a will dated the 29th of July, 1868, and a codicil dated the 12th of October, 1868, and therein appointed the defendants, Alfred James Smith and George Lawrence, executors. On the 7th of November, 1868, the deceased executed a document by making a mark thereto in the presence of two witnesses, to the following effect:—"I hereby make a free gift to Maria Robertson of sixty pounds, and to John Virtue of fifty pounds, being the sum deposited by me with the Islington branch of the London and County

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Bank." Miss Robertson, the plaintiff, propounded this paper as a second codicil to the will of the deceased, and the defendants pleaded that it was not executed according to the provisions of the statute 1 Vict. c. 26, and that the deceased did not make a second codicil to his last will and testament. At the hearing Mr. Virtue, the legatee and one of the attesting witnesses to the will, deposed that he was applied to to draw the codicil on the 7th of November, 1868, by Mrs. Smith, with whom the deceased lodged. That he went to the deceased's house in the afternoon and saw him. He was in a low state, but much as usual. That the deceased knew deponent and nodded to him. Miss Robertson then said, "Mr. Virtue has called about the money of which I am to have 60*l.*, he 50*l.*" The deceased in a low tone, answered "Yes." The deponent wrote out the paper, which was read over by him or by Miss Robertson in his presence to the deceased, and a second time after Mr. Tarrant, the second witness, arrived. The deceased made no observation. Deponent placed a pen in deceased's hand, and he made his mark at the foot of the writing, in the presence of the witnesses who signed their names in his presence. The deceased had been paralysed for two years, but quite understood what he was about when he put his mark to the paper. Mrs. Smith, with whom the deceased lodged, deposed that before she went to Mr. Virtue, Miss Robertson, in her presence, spoke to Mr. Craven about the deposit note, and asked where it was, and he said it was in his box at the bank. He then called to Miss Robertson and said, "Auntie, I should like Mr. Virtue to have 50*l.* of it, and you the rest to do the burial." Dr. Powell, who attended upon him before his death, said the deceased was paralysed, but conscious and able to talk, although not much, and that he was capable of understanding what was said to him on the day of his death.

Jan. 28. *Littler* appeared for the plaintiff, in support of the codicil. He referred to *The King's Proctor* v. *Daines.* (1)

J. Tindal Atkinson, for the defendant.

Cur. adv. vult.

Feb. 15. LORD PENZANCE. The deceased in this case executed in the presence of witnesses a paper to the following effect:—"I

(1) 3 Hagg. Eccl. 218.

hereby make a free gift to Maria Robertson of sixty pounds, and to John Virtue of fifty pounds, being the sum deposited by me with the Islington branch of the London and County Bank," and the question for my determination is whether this paper can be admitted to form part of the probate, as a codicil to the will of the deceased. The guiding principle in determining whether a paper is or is not of a testamentary character, has been determined to be this—that it will be held testamentary if it were the intention of the testator that the gifts made by it should be dependent on his death. The question then is, how is that intention to be ascertained? It has long since been decided that if the language of the paper is insufficient, parol evidence may be admitted to ascertain such intention, and in the case of *In the Goods of English* (1), the Court adhered to that principle. Looking at the facts proved in this case, I have no doubt that the testator did intend that this gift should be dependent on his death. He was possessed of a sum of money on deposit in a bank, and he was dying at the time he executed this paper. The Court has no doubt that the disposition was in contemplation of death, and that the deceased did not intend to strip himself of this property should he, contrary to his expectations, survive. The Court therefore makes the grant. The costs of both parties will be paid out of the estate.

Attorneys for plaintiff: *Digby, Sharp, & Co.*
Attorney for defendant: *A. Digby.*

(1) 3 Sw. & Tr. 586; 34 L. J. (P. M. & A.) 5.

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March 15.

IN THE GOODS OF R. R. PEEL.

Will—Appointment of Executor—Error in Name—Parol Evidence.

The testator appointed as one of his executors Francis Courtenay Thorpe, of Hampton, gentleman. There was living a youth of twelve years of age to whom the name and description applied. The Court refused to admit evidence to shew that the testator intended the father of the youth, whose name was Francis Corbet Thorpe.

ROBERT RAINE PEEL, late of Hampton, in the county of Middlesex, gentleman, died on the 9th of February, 1869, having duly executed a will, bearing date the 28th of January, 1869. In this will he appointed executors in the following words: "I hereby appoint Francis Courtenay Thorpe, of Hampton aforesaid, gentleman, Richard Coombes, of Hampton Court, in the said county of Middlesex, gentleman, and John Taylor, the younger, of the same place, gentleman, executors and trustees of this my will." Mr. Francis Corbet Thorpe, of Hampton, Middlesex, in his affidavit stated that in January, 1869, the deceased asked him to be one of his executors and trustees, in conjunction with Messrs. Coombes and Taylor, junior, and that he (Mr. Thorpe) consented thereto. Mr. Taylor also stated that the will was drawn by him and executed in his presence, and that there was not the least doubt that the deceased intended to appoint Mr. Francis Corbet Thorpe one of his executors. Mr. Thorpe had a son, a youth only twelve years of age, whose name is Francis Courtenay Thorpe.

Dr. Spinks, Q.C., moved that probate should be granted to Mr. Francis Corbet Thorpe with the two other executors. He submitted that the description of *gentleman* was not applicable to a youth of twelve, and that as there is therefore nobody to whom the whole description is applicable, the Court will read the affidavits, and from them will not hesitate to come to the conclusion that the testator intended to appoint Mr. Francis Corbet Thorpe.

LORD PENZANCE. If I am at liberty to look at the facts stated on the affidavits, I may possibly have no difficulty in deciding that the person meant is the father, but the question is, whether I am at liberty to do so. The testator on the face of his will says, "I

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IN THE GOODS OF PEEL.

hereby appoint Francis Courtenay Thorpe, of Hampton aforesaid, gentleman, executor and trustee." The description so given is a description which applies to a youth of twelve, who has those Christian names, who resides at Hampton, and is a gentleman. There are, therefore, no grounds to entertain the question I have put, and I cannot refer to the affidavits. The testator makes use of a description which applies in fact to one person, and not to any other. There is, therefore, no ambiguity. (1) It is said that the testator would not be likely to appoint a boy of twelve years old an executor; but he is only one of three, and in the event of the testator living for some years after his will was made, it might be desirable to have one executor more likely than the others to survive him. It may be, however, that the testator has not expressed his real meaning, but the Court cannot inquire whether he has done so or not. I cannot grant probate to Mr. Francis Corbet Thorpe.

Attorney: *John Taylor, Jun.*

GREENHALGH *v.* BATES.

March 29.

Will—Residuary Legatees—Vested Interest—Right to a de bonis Grant.

The testator left by will to his wife a life interest in his real, leasehold, and personal estates, with permission to consume such portions of the latter as are consumable by nature. He also required her to maintain and educate their children. On the death or re-marriage of his widow he left his real and leasehold estates, and such personal estate as was then unconsumed, to his children in equal shares, their executors, administrators, and assigns, with a proviso that, if all and every his children died before obtaining a vested interest under the will, the property should go in equal shares to his then next and nearest of kin, and the then next and nearest of kin of his wife. The testator's only child survived him, but died in his mother's lifetime and previous to her re-marriage:—

Held, that the child did not attain a vested interest under the will, and that administration must be granted to the next of kin of the testator.

JOHN GREENHALGH, of Failsworth, Lancashire, died on the 7th of April, 1856, having duly executed a will dated the 17th of September, 1855, in which he appointed his wife, Mary Greenhalgh, executrix. The material parts of this will were as follows:—

(1) As to the admissibility of such evidence where there is an ambiguity, see *Grant* v. *Grant*, ante, p. 8, and *Grant* v. *Grant*, Law Rep. 5 C. P. 380.

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"I give, devise, and bequeath all and singular the real leasehold and personal estate and effects of which I shall be seised or possessed or otherwise entitled to at my decease unto my wife Mary . . . upon trust, so long only as she shall continue my widow, to use and enjoy my furniture and household and other effects, and to consume such of the said personal estate and effects as are consumable by nature, and to receive and apply the income arising from the said real leasehold and personal estates for the maintenance of herself and the maintenance, education, and bringing up of all and every my present and future children and child. And upon or immediately after the decease or second marriage of my said wife I give, devise, and bequeath my real and leasehold estates, and my personal estate and effects then remaining unconsumed, unto all and every my present and future children and child, and, if more than one, in equal shares, and their respective heirs, executors, administrators, and assigns, as tenants in common, and not as joint tenants, according to the nature and tenure of the said estates and effects respectively. Subject, nevertheless, to and in the event of the second marriage of my said wife, I hereby charge the same with the payment to her during the remainder of her life of an annuity or clear yearly sum of 15*l.* by equal quarterly payments, the first of which shall be due on the day of her second marriage. . . . If all and every my children and child shall happen to die before attaining a vested interest under this my will, then I give, devise, and bequeath my real leasehold and personal estates and effects, subject as herein mentioned, unto the then next and nearest of kin of myself, and the then next and nearest of kin of my said wife, in equal shares as tenants in common, and not as joint tenants, and their respective heirs, executors, administrators, and assigns, according to the nature and tenure thereof respectively." The testator left surviving him one child, John Greenhalgh, who died a bachelor and under age on the 21st of June, 1856. Mary Greenhalgh, as executrix, proved the will of the deceased in the month of April, 1856, and on the 27th of April, 1858, she married John Bates. On the 1st of September, 1869, she died, leaving part of the estate of the deceased John Greenhalgh the elder unadministered. Samuel Greenhalgh, the plaintiff, is the natural and lawful brother, and was one of the nearest and next of kin of

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the testator at the time of the second marriage of Mary Greenhalgh, and at the time of the death of the child John Greenhalgh the younger. The defendant, John Bates, as husband of Mary Bates, and so representative of John Greenhalgh the younger, claimed administration with the will annexed of the unadministered effects of the testator, John Greenhalgh the elder, by reason that under the will the whole property, subject to the life interest of Mary Bates, vested in John Greenhalgh the younger on the death of his father. The plaintiff, on the other hand, contended that the child never took an indefeasible vested interest, and that he, as nearest of kin to the testator on the re-marriage of the widow, was interested in the residue of this property.

March 22. *Bayford*, for the plaintiff, admitted that if the gift to the children after the decease or second marriage of the wife had stood alone, the estate would have vested absolutely in the child on the death of the testator; but the gift over contemplates the possibility of the death of the child or children in the lifetime of the widow or before her second marriage, and in that case bequeaths the property to the *then* next of kin of himself and the *then* next of kin of his wife in equal shares. The words "vested interest" in the gift over must mean indefeasibly vested by possession, which could only have been attained by the child if he had survived the second marriage of the widow. The gift over, therefore, takes effect. He referred to *Re Baxter's Trusts* (1) and *In re Edmondson's Estate.* (2)

Dr. Tristram, for the defendant. If a testator, in his will, makes use of words which are sufficient to establish in an individual a vested interest in property on the testator's death, he cannot divest that individual in a subsequent part of his will except in clear and distinct terms. He referred to *Casamajor* v. *Strode*, 2 Jarman on Wills, 748 (ed. 1861); *Re Thompson's Trusts.* (3)

Cur. adv. vult.

March 29. LORD PENZANCE. The Court reserved the consideration of this case, which depends upon the construction of a will.

(1) 10 Jur. (N.S.) 845. (2) Law Rep. 5 Eq. 389.
(3) 5 De G. & S. 667.

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The testator's general scheme was as follows. He provides for his widow so long as she should remain his widow, and gives her the enjoyment of his furniture and household and other effects, with authority to consume such of his personal estate and effects as are consumable by nature, and to receive and apply the income arising from his real leasehold and personal estates for the maintenance of herself and children; and upon the decease or second marriage of his wife he gives his real and leasehold estates, and the personal estate *then* remaining unconsumed, to all his existing and future children, with a proviso that if all and every his children or child shall happen to die before attaining a vested interest under his will, his real leasehold and personal estates and effects shall go to the *then* next and nearest of kin of himself, and the *then* next and nearest of kin of his wife, in equal shares.

Now, the events which happened are these: — The testator died in April, 1856; his only child died a bachelor and under age in June, 1856; and the widow re-married in April, 1858. The question is, whether, under the clauses of the will, the child did or did not die before he attained a *vested interest* in the property of his father. It is not denied that the terms of the will in the anterior part create, according to the rules laid down in courts of equity, a vested interest at the death of the testator; but it is argued that the words "vested interest," as used by the testator in the proviso, do not bear the technical sense which is there in question, but mean a vested interest in possession to arise on the death or second marriage of the mother. I have been referred to several authorities on both sides. The rules of construction in force in the courts of equity are somewhat technical, but the result amounts to this, that in each case such a construction is put on a will as, on the whole, realises the true meaning of the testator. The conclusion I have come to in this case is, that the testator did not refer to a vested interest of a technical character, but to a vested interest to arise on the death or second marriage of his wife. The testator desired to provide for whichever of these two events should first happen. Up to that time his widow was to continue in possession of the testator's property, and to enjoy the rents and annual income. On her second marriage or death he intended the provisions in favour of his children to come into operation, and the gift over

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was, I think, intended to take effect if at that time no child existed to take the benefit of such provisions. The personal property left to the children was so much as was unconsumed on the death or second marriage of the widow; and until one or other of such events happened the amount of the gift would be uncertain. I am of opinion that the person entitled to administration is the next of kin of the testator, namely, the plaintiff. I may add that it is only by consent of both parties that I have undertaken to decide this question. I think it is inconvenient, on a mere dispute as to the right to administration, to decide a question of construction which, most likely, will afterwards go before a court of equity. It was suggested that the property is small, and it is improbable that the matter will be further litigated.

The costs of both sides will be paid out of the estate of the deceased.

Proctor for plaintiff: *A. Ayrton.*
Proctor for defendant: *G. C. Ring.*

EATON *v.* EATON AND CAMPBELL.

Jan. 18.

Matrimonial Suit—Alimony—Allowance from Father to Respondent.

The father of the respondent, on her marriage with the petitioner, undertook, in a letter to the petitioner, to make her an allowance of 100*l.* per annum during his life. Such allowance had been paid for some years in one sum in a particular month of the year.

The Court refused to grant to the respondent alimony out of her husband's income, which did not much exceed her allowance, the month in which it might be expected that the allowance would be paid not having arrived.

IN this case John Sumner Eaton petitioned the Court for a dissolution of his marriage by reason of the adultery of his wife, Henrietta Amelia Eaton, with the co-respondent. On the 5th of November, 1869, the respondent filed a petition for alimony, in which she alleged that the petitioner is in receipt of pay-money as a lieutenant in Her Majesty's navy at the rate of 6*s.* a day. The answer of the petitioner admitted this, and in the fourth paragraph stated that prior to his marriage the respondent's father, Mr. Flexmore, undertook, in a letter written to the petitioner and signed

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by Mr. Flexmore, that he would, in the event of the marriage, make to his daughter an allowance of 100*l.* per annum during his life, and that on his death she should share alike with his other children in his property. The respondent, in her replication, admitted the allowance had been promised by her father, and that in March, 1867, and March, 1868, and February, 1869, she had received three several sums of 100*l.* from her father, who resides in Hobart Town, Tasmania; but she further said that since July last she has not heard from him, and she is advised that she has no legal claim against him for a continuance of the allowance, and that any equitable claim there may be against him on account of the letter written to the petitioner is vested in the petitioner, and he alone can enforce it.

M'Intyre submitted that the respondent was entitled to be paid alimony out of her husband's income. She has not received anything from her father for some months, and cannot enforce payment from him.

Dr. Tristram appeared for the petitioner.

THE JUDGE ORDINARY. I think, in substance, I must hold that the wife has an allowance from her father of 100*l.* per annum. She received it last March, and I have no reason to doubt that she will receive a further payment in March next. The husband's income is very small, and I ought not to encroach upon it without being first satisfied that the wife is without means of subsistence. I shall therefore make no order. If March passes over, and no money arrives from her father, it may be proper for me to make some order upon the husband, who can then take steps to enforce the allowance against the father.

Proctors for petitioner: *Nelson & Son.*

Attorneys for respondent: *Lanfear & Stewart.*

PRITCHARD *v.* PRITCHARD AND BEAN. 1870

Matrimonial Suit—Verdict for Petitioner—Damages—Co-respondent Removing his Effects—Peremptory Order for Payment. March 19.

2 L.D. 24

In a suit for dissolution of marriage the jury found a verdict for the petitioner, and gave damages against the co-respondent. The Court made a decree nisi. Subsequently, on affidavit that the co-respondent had removed his furniture and other effects from his residence, the Court made a peremptory order that the damages should be paid to the petitioner within two days, and that, if they were not paid within that period, a writ of fi. fa. should issue forthwith.

JOHN PRITCHARD instituted a suit for dissolution of marriage, by reason of the adultery of his wife, Rose Pritchard, with the co-respondent, John George Whittington Bean. The adultery was denied by both the respondent and the co-respondent. The questions in issue were tried before the Judge Ordinary and a special jury on the 26th of February last, and a verdict given in favour of the petitioner, with damages against the co-respondent 500*l*. The Judge Ordinary made a decree nisi, and condemned the co-respondent in the costs. An affidavit was now filed by Mr. Sykes, the solicitor to the petitioner, and Mr. Watson his managing clerk, in which they stated that no part of the damages or costs had been paid, or security given for them; that, acting on information they had received, Mr. Watson on the previous day (the 18th of March) had made inquiries at the police-station at Hampstead, and was informed that the co-respondent, who had carried on the business of a coal agent, and resided at No. 37, Downshire Hill, Hampstead, on the 16th of March, caused all his furniture to be removed from his said house by a person of the name of George Harvey. On making further inquiries in the neighbourhood, Mr. Watson was informed that certain boxes likely to contain plate or valuables had been sent by the co-respondent to the house of his mother-in-law. The deponents lastly stated that they believed the intention of the co-respondent to be to remove his person and property from the jurisdiction of the Court, in order to defeat the claim of the petitioner to the payment of the costs and damages.

Dr. Spinks, Q.C., moved the Court to order the co-respondent to pay the damages at once to the petitioner, or into Court. There

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is nothing to prevent the Court making such an order where the circumstances require it, even although the decree has not been made absolute.

THE COURT inquired whether there were any children of the marriage?

Dr. Spinks. Two, who are residing with the petitioner.

THE COURT thereupon directed that an order should issue to the co-respondent to pay the damages assessed by the jury to the petitioner within two days from the date of the service of the order, and further ordered that, in the event of the damages not being paid to the petitioner within that period, a writ of fi. fa. should be issued forthwith.

March 22. *Dr. Spinks, Q.C.*, applied to the Court to order the writ of fi. fa. to issue at once, without a personal service of the previous order for payment of the damages upon the co-respondent. He read an affidavit to the effect that the co-respondent was keeping out of the way to evade such service, and that notice of the order had been given to his wife, brother, and solicitor.

THE JUDGE ORDINARY granted the application.

Attorneys for petitioner: *Wells & Sykes.*

March 22.

MILLER *v.* MILLER.

Restitution of Conjugal Rights — Order to return home, and to pay Costs —Disobedience — Respondent out of Jurisdiction — Sequestration without attachment—Practice.

In a suit for restitution of conjugal rights against a wife, there being no defence, the usual order was made that she should return to her husband's house within a certain number of days, and certify to the Court that she had done so, and on the Court being satisfied that she had a considerable separate estate, it further ordered that she pay the costs of the proceedings. The respondent was abroad and did not obey the order of the Court to return to her husband at all, or to pay the costs until after a long delay. The Court ordered a writ of sequestration to issue against her estate, in the first instance, without attachment.

THIS was originally a suit for restitution of conjugal rights brought by Dr. Miller against his wife. The respondent made

charges against her husband, which were abandoned at the hearing, and on the 14th of July, 1869, the Judge Ordinary pronounced a decree for restitution of conjugal rights, and made the usual order that the respondent should return to her husband's house within a certain number of days, and certify to the Court that she had done so. Subsequently, on the 23rd of November, 1869, on being satisfied that the respondent had a sufficient separate property, he condemned her in the costs of the proceedings. (1) The respondent is travelling abroad, and has not obeyed the order to return to her husband's house. The costs, after some delay, were paid.

Dr. Spinks, Q.C. (*Dr. Tristram* with him), moved the Court to order a writ of sequestration to issue against the separate estate of the respondent, for the purpose of compelling obedience to its orders. He cited *Dent* v. *Dent* (2); *Clinton* v. *Clinton* (3); *Crispin* v. *Cumano.* (4)

Dr. Deane, Q.C., Hemming, and *Ernst Browning,* appeared for the respondent. It is contrary to the practice of the Court of Chancery to issue a sequestration without first issuing an attachment. If an attachment be not issued, it is incumbent upon the applicant for a sequestration to satisfy the Court that he is in a position to move for and obtain an attachment. The respondent in this case not having been personally served, the applicant is not in a position to move for and obtain an attachment, and therefore is not entitled to a sequestration.

The following authorities were cited: Morgan's Chancery Acts and Orders, p. 513; Braithwaite's Record and Writ Practice, p. 239; Seton on Decrees, p. 1224; *Foster* v. *Bell* (5); *Sykes* v. *Dyson* (6); *Hodgson* v. *Hodgson* (7); *Hope* v. *Carnegie.* (8)

Cur. adv. vult.

March 22. THE JUDGE ORDINARY. The question in this case is, whether this Court has authority to issue a writ of sequestration for the purpose of enforcing obedience to its orders, and the

(1) Ante, p. 13.
(2) Law Rep. 1 P. & M. 366.
(3) Law Rep. 1 P. & M. 215.
(4) Law Rep. 1 P. & M. 622.
(5) Law Rep. 9 Eq. 172.
(6) Law Rep. 9 Eq. 228.
(7) 23 Beav. 604.
(8) Law Rep. 7 Eq. 254.

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answer depends upon another question, whether a court of equity has the power to issue sequestration for that purpose. It was argued that it is the universal rule in the courts of equity, that before such an order is made it shall be preceded by the issuing of a writ of attachment. It would be very unfortunate if such were the practice, for in many cases a writ of attachment would be a mere idle writ; as, for instance, if the person in contempt were out of the jurisdiction of the English courts. No doubt the courts of equity are in the habit of looking at the writ of sequestration as a further measure, if the writ of attachment should turn out to be unsuccessful, and therefore they try the effect of the latter first. I have looked into the cases, and I do not find that this practice is so universal as stated. In *Hodgson* v. *Hodgson* (1) an attachment issued into a county in which the defendant had never resided, and a return of non est inventus was made. The proceeding, therefore, was altogether a nullity, but the Court ordered a sequestration to issue without any further attempt to attach the defendant. In *Butler* v. *Matthews* (2) it was held that when the defendant is abroad it is not necessary to issue an attachment previous to taking a bill pro confesso. That was an analogous matter to the present, although not similar. In the case *Re The East of England Bank* (3), a Mr. Hale having been placed upon the list of contributories to the bank, made over all his property to his son, and left England. Upon an application for a writ of sequestration against him without attachment, Sir R. T. Kindersley said, "If the practice is that in order to obtain a writ of sequestration, you must first get a writ of attachment, the effect is that there is no provision for sequestration in the case of persons who are not resident in England." This is a direct authority in favour of what is obviously the most sensible course, and therefore I shall direct a writ of sequestration to issue. It may be necessary hereafter to decide what property will be subject to the writ.

Attorney for petitioners: *R. Miller.*
Attorney for respondent: *A. Jones.*

(1) 23 Beav. 604. (2) 19 Beav. 546.
(3) 10 Jur. (N. S.) 1093.

NEWMAN *v.* NEWMAN. 1870 *March* 22.

Unreasonable Delay—20 & 21 *Vict. c.* 85, *s.* 31.

A wife separated from her husband in 1850, in consequence of his incestuous adultery with her sister; and in 1868 she presented a petition for a dissolution of marriage on the ground of that adultery. Her explanation of the delay which had occurred in presenting the petition was, that her mother was very anxious to avoid a public exposure of the scandal, and she yielded to her mother's urgent entreaties, and forbore to take proceedings until her mother's death:—

Held, that the petitioner had been guilty of unreasonable delay, but not of such a character as to deprive her of her right to a decree.

THIS was a petition by a wife for a dissolution of marriage on the ground of the husband's incestuous adultery. There was no appearance, and the case was heard by the Judge Ordinary on the 17th of March.

Kemp, and *Keeble*, for the petitioner.

It was proved that the parties were married in February, 1844 and afterwards cohabited at Clapham, where the petitioner kept a school. In 1849 the respondent was guilty of adultery with the petitioner's sister, who resided in the same house with them. This adultery came to the petitioner's knowledge, and she thereupon, in January, 1850, separated from him. She stated that the intercourse between her husband and her sister continued for some time after the separation.

The petitioner was examined as to the reason of the delay which had occurred in instituting proceedings, and she stated that her mother was very reluctant to have the scandal in the family exposed, and that she yielded to her mother's urgent entreaties, and had taken no step in the matter during her mother's life. As soon as her mother died she presented this petition.

THE JUDGE ORDINARY. If the delay in this case be not unreasonable, I do not know what delay can be considered unreasonable. But I will consider whether I can grant a decree.

March 22. THE JUDGE ORDINARY. The petitioner in this case proved that many years ago her husband was guilty of incestuous

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adultery with her sister. That adultery was followed by the separation of the husband and wife, she refusing to live any longer with him; and, according to her statement, the intercourse between him and her sister was continued after the separation, and for some time they cohabited as husband and wife. But a long time (nearly twenty years) has elapsed since the events occurred. The petitioner fairly admitted, that the reason why she did not apply sooner to the Court was, that her mother was very desirous that these family matters should not be made public, and that she yielded to her mother's entreaty. At the time of the hearing I expressed an opinion that a person who had forborn to come to the Court for so many years for the sake of her own feelings or the feelings of those connected with her, must be held to be guilty of unreasonable delay. I adhere to the opinion that there was unreasonable delay in presenting the petition. But the statute (1) does not say that in all cases where unreasonable delay has occurred a decree must be refused. It merely says that in such cases the Court shall not be bound to pronounce a decree. The question is whether, assuming that there has been unreasonable delay, the case is one in which, under all the circumstances, the Court should withhold a decree? No doubt the cases which the legislature had principally in view, when the provision as to unreasonable delay was inserted, were those in which a husband's honour had been wounded, and he had put up with his own disgrace for a length of time. The rule vigilantibus non dormientibus jura subvenient obtained in the Ecclesiastical Courts, and was adopted by the House of Lords. That is one class of cases, and no doubt there are many others to which this discretionary bar is applicable. But, looking at all the circumstances of this case, I think I should not be justified in refusing a decree.

Decree nisi, with costs.

Attorney for petitioner: *E. Moss.*

(1) 20 & 21 Vict. c. 85, s. 31.

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Feb. 9.

Judicial Separation—Cruelty—Undue Exercise of Marital Authority.

If force, whether physical or moral, is systematically exerted to compel the submission of a wife to such a degree and during such a length of time as to injure her health and render a serious malady imminent, although there be no actual physical violence such as would justify a decree, it is legal cruelty, and entitles her to a judicial separation.

THIS was an appeal from a decree of judicial separation pronounced by the Judge Ordinary at the instance of the petitioners on the ground of her husband's cruelty. (1) The appeal came on for argument before the full Court (2) on the 19th of January.

Mr. Kelly, in person, argued in support of the appeal. He stated the various grounds on which he complained of Mrs. Kelly's conduct, and submitted that the measures of discipline and restraint which he had adopted were fully justified, and did not constitute cruelty.

Dr. Deane, Q.C., and *Inderwick*, for the petitioners, were not called upon.

Feb. 9. CHANNELL, B. This is an appeal to the full Court from a decision of the Judge Ordinary. Lord Penzance is desirous that my Brother Hannen and myself should first state our views. I proceed, therefore, to deliver our joint opinion.

The appeal is by the Reverend James Kelly against a decree whereby the Judge Ordinary, on the petition of the appellant's wife, Frances Kelly, decreed in favour of the petitioner for a judicial separation from her husband on the ground of cruelty. Mr. and Mrs. Kelly were married in Ireland in the year 1841. There was issue of the marriage a child deceased, and a son now living who was born in 1845.

With the exception of a visit made by Mrs. Kelly to Wales and Ireland (to which visit we propose hereafter to refer), Mrs. Kelly lived under the same roof with Mr. Kelly from the time of the

(1) Ante, p. 31.
(2) The Judge Ordinary, Channell, B., and Hannen, J.

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marriage until January, 1869. Since that time Mr. and Mrs. Kelly have ceased to cohabit, Mrs. Kelly having left her husband's home and claimed from this Court the decree for judicial separation now appealed against.

There is some evidence that on one or two occasions Mr. Kelly laid hands on Mrs. Kelly against her consent. But the evidence is so slight on this head that we think it safer to treat the case (as it was considered by the Judge Ordinary) as one in which there is an absence of any proof of such physical violence towards the wife on the part of the husband as would justify a decree.

The question then arises, whether the decree is erroneous in holding that, although there was not such actual physical violence on the part of the husband towards the wife, there is shewn to be that cruelty which will entitle her to ask this Court for a decree for judicial separation.

The appellant seeks the reversal of the decree on two grounds. First, that the Judge Ordinary has erred in point of law in the definition which he has given of cruelty; and secondly, that the evidence does not establish that the appellant has been guilty of legal cruelty. The passages in the judgment of the Judge Ordinary, in which he has laid down the principles upon which his decision is based, are the following:—"The peculiar and distinguishing feature of this case is, the adoption by the respondent of a deliberate system of conduct towards his wife, with the view of bending her to his authority. . . . If force, whether physical or moral, is systematically exerted for this purpose, in such a manner to such a degree and during such a length of time as to break down her health and render serious malady imminent, the interference of the law cannot be justly withheld by any Court which affects to have charge of the wife's personal safety. Moreover," says his Lordship, "the decisions have imported this further proposition as a condition of the Court's interference, that the troubles of the wife are not owing to her own misconduct."

We are of opinion that the above-cited passages contain an accurate, and, so far as was necessary for the determination of the case, a complete statement of the law on the subject. It would be difficult to frame a definition of legal cruelty which should be applicable to all the cases which may arise. The object

of the Matrimonial Court in exercising its jurisdiction in decreeing judicial separation for cruelty is to free the injured consort from a cohabitation which has been rendered, or which there is imminent reason to believe will be rendered, unsafe by the ill-usage of the party complained of. It is obvious that the modes by which one of two married persons may make the life or the health of the other insecure are infinitely various, but as often as perverse ingenuity may invent a new manner of producing the result, the Court must supply the remedy by separating the parties. The most frequent form of ill-usage which amounts to cruelty is that of personal violence, but the courts have never limited their jurisdiction to such cases alone, as will be clearly seen by reference to some of the authorities which we proceed to cite.

In giving his judgment in the case of *Curtis* v. *Curtis* (1), the late Judge Ordinary, Sir Cresswell Cresswell, quoted largely from the decision of Lord Stowell in *Evans* v. *Evans*. (2) *Evans* v. *Evans* (2) was a case in which the wife, complaining of some trifling acts of violence committed by the husband, mainly relied on an apprehension of such violence, if cohabitation continued, as would render that cohabitation unsafe. His lordship, however, considered the question with reference to the effect of the husband's treatment on the *health of the wife*. In *Evans* v. *Evans* (2), Lord Stowell used the following language, afterwards adopted by Sir Cresswell Cresswell in *Curtis* v. *Curtis* (1) :—" Proof must be given of a reasonable apprehension of bodily hurt. I say an apprehension, because assuredly the Court is not to wait till the hurt is actually done: but the apprehension must be reasonable, not arising merely from diseased sensibility of mind."

In *Harris* v. *Harris* (3) it is said, " There must be something that renders cohabitation unsafe, or is likely to be attended with injury to the person, *or to the health of the party*." Again, in *Waring* v. *Waring* (4), " The usual principles require that such complaints should be supported by proofs of violence and ill-treatment, endangering or at least threatening the life, or person, *or health of the complainant*." In *Holden* v. *Holden* (5), it is laid down

(1) 1 Sw. & Tr. 192; 27 L. J. (P. M. & A.) 73.
(2) 1 Hagg. Const. 35.
(3) 2 Hagg. Const. 148, 149.
(4) 2 Hagg. Const. 153, 154.
(5) 1 Hagg. Const. 453.

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that it is not necessary that the conduct of the wife should be entirely without blame, for the reason which would justify the imputation of blame to the wife would not justify the ferocity of the husband.

We think that the judgment appealed against is in conformity with the law as previously laid down, and we now proceed to consider whether the facts proved in evidence establish that the appellant was guilty of cruelty in the sense attributed to that word in the authorities referred to. After a very anxious and careful consideration of the evidence we are satisfied that the acts imputed to Mr. Kelly, as stated in the judgment of the Judge Ordinary are established. What are those acts? First, as to Mr. Kelly's conduct before his wife left his roof for Wales and for Ireland. As to these acts we quote the language of the Judge Ordinary, in which we entirely concur, and which we consequently adopt. It is unnecessary to quote the evidence in support of this enumeration; it is sufficient to say that in our opinion every sentence we quote is warranted by satisfactory proof.

"He opened her letters. He called her a vile traitor and apostate. He told her that no modest woman would associate with her. That she had given her confidence to another man. He refused to sit at meals with her. He insisted on occupying a separate bed-room. He told the servant to take orders from him, and not from his wife. He kept apart from his wife all day."

We purposely omit the statement that he desired her not to attend the administration of the sacrament, as we accept Mr. Kelly's explanation on this point, that what he did was not in the exercise of any authority over his wife, but only by way of advice.

Mrs. Kelly left home on or about the 29th day of June, 1868; she was away travelling with relations, in Wales, and afterwards paid a visit to other relations in Ireland; she was away for nearly four months; she left England without her husband's consent. To this circumstance we shall afterwards advert. She returned home in October, 1868. What was Mr. Kelly's conduct to her on her return? Again we quote the language of the Judge Ordinary, whose view of the evidence we entirely adopt.

"Mrs. Kelly was purposely subjected to the following treatment. She was entirely deposed from her natural position as

mistress of her husband's house. She was debarred the use of money. Not only were the household expenses withdrawn from her control, but she was not permitted to disburse any for her own necessary expenses. Every article of dress, every trifle that she required, had to be put down on paper, and her husband provided it if he thought proper. Having, on one occasion of going into town, declined to tell her husband on her return every house to which she had been, an interdict was placed on her going out at will. At one time the doors were locked to keep her in; at another a man-servant was deputed to follow her; at another the appellant insisted on accompanying her himself whenever she wanted to go abroad. On these occasions he appears to have occupied the short time they were together in what he called putting her sin before her in strong, coarse, and abusive terms, applying to her the same epithets and language as would be applicable to a woman who had been guilty of adultery. He took no meals with her; he occupied a separate bedroom; he passed no portion of the day, however small, in her society. They met as before at family prayers, and if he spoke to her at all it was only to give some direction or to reproach her. Save on one or two occasions, she saw no one. Those whom she desired to see were forbidden the house. She was absolutely prohibited from writing any letters unless her husband saw them before they were posted. She was thus, as far as the appellant could achieve it, practically isolated from her friends. Meanwhile the care of the household was confided to a woman hired for the purpose, who was directed not to obey Mrs. Kelly's order without the respondent's. In fact, she was treated like a child or a lunatic, and this, be it remembered, although she had passed the mature age of sixty years, and had been married to the appellant for seven-and-twenty years."

What was the effect of this treatment on Mrs. Kelly's health? My Brother Hannen and I are quite satisfied upon the medical evidence, and upon the evidence of Mrs. Kelly, that the treatment she experienced from Mr. Kelly before she left for Wales had such an effect upon her as to cause change of air and scene, and absence from her husband, to be necessary, and that from the treatment she suffered after her return from Ireland her health was so broken down that to continue subject to the same treatment for any length

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of time would not only have seriously imperilled her health, but would have exposed her to the highly probable consequence mentioned by the medical men, viz., paralysis or madness. It was, if we may say so, well observed by the Judge Ordinary that the state of Mrs. Kelly's health, her actual condition, and danger, were not denied by the appellant. He contented himself with ascribing it to vexation at the discovery of what he called her own treachery, and not to his treatment of her, thus differing the cause but not controverting the fact. Mr. Kelly has strenuously contended, on the hearing of this appeal, that the wife's conduct has been such as to explain away what otherwise might appear to be cruelty on his part, and to lead fairly to the view that her conduct on various occasions justified him, in the exercise of his marital rights, in acting towards her as he has done. It will be right, therefore, to review the acts of Mrs. Kelly, and to see how far they give the appellant the excuse or justification he sets up. One circumstance much relied on occurred as long ago as the year 1850. It would appear from letters of Mrs. Kelly put in evidence by Mr. Kelly that she had, under the influence of jealousy, suspected Mr. Kelly of improper connection with a lady, a resident under the same roof. Of this suspicion she appears to have been relieved by Mr. Kelly's own statement. Her language is: "When you put the case before me in plain words I shrank from the thought of such a suspicion of either of you." Mrs. Kelly was assured of her husband's forgiveness, but, in effect, told that she had lost his confidence for ever. In the endeavour to regain it, and sorrowing for having entertained a groundless suspicion, she retracted the charge, and expressed the utmost contrition and remorse at having made it.

[Having referred to some of the letters which passed between Mr. and Mrs. Kelly on this occasion, his Lordship continued:—]

We think that this correspondence does not tend to support the appellant's case. So far as it throws light on the characters of the parties it proves that Mrs. Kelly, satisfied by her husband's assurance that she had done him injustice, did all that she could to shew her penitence and regain his affection and confidence, while it shews, on the other hand, that Mr. Kelly was severe and slow to forgive. Whether he ever did restore her to his confidence

can only be inferred from the events out of which the present suit has arisen, but it may be concluded from the manner in which the appellant has preserved and used this correspondence twenty years after its date that nothing has occurred in the intervening period on which he can found an accusation against her.

The appellant has enumerated twenty-five overt acts (as he terms them) of his wife on which he relies as justifying his conduct towards her. We do not propose to examine them all in detail; some of them are entirely unfounded, others are too trivial to require notice, and others, indeed the greater number, cannot serve as a justification of the appellant's conduct, for they were the consequences of it. It may well be that Mrs. Kelly, smarting under the harsh treatment which her husband inflicted on her, did not at all times preserve her temper, and she may on some occasions have done things which we should condemn, and she would herself regret, but a wife does not lose her title to the protection of this Court merely because she has proved unable to bear with perfect patience and with unfailing propriety of conduct the ill-usage of her husband.

We now proceed to examine such of the charges against Mrs. Kelly, as appear to us to call for notice.

The first is, that she abetted her son in prematurely, and against his father's wishes, leaving the paternal roof; the second, that she encouraged her son in disobedience to his father.

The son of the appellant, a young man over twenty-one, had become dissatisfied with his position at home and desired to earn a livelihood by undertaking the duties of a tutor. It is no part of our task to determine whether he was justified in taking the steps he did, or whether they were such as deservedly to bring upon him the penalty of being cast off by his father as an "unnatural son," and excluded from the paternal roof. Mrs. Kelly does not appear to have abetted or encouraged him to act against his father's wishes, although, no doubt, she played the part which usually belongs to the mother in such cases. She endeavoured to excuse the son to his father, and to make his conduct appear less blameworthy than his father considered it.

The third charge is that she made excuses for her son having an immoral book in his possession. Of this there is no proof.

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The fourth charge is that "she endeavoured in effect to make her husband a bankrupt." This accusation illustrates the spirit of exaggeration which pervades the whole of the appellant's charges against his wife. Mr. Kelly desired that a portion of his wife's money in settlement should be invested in a house. Mrs. Kelly, at one time, at her husband's request, wrote a letter to her trustees in which her assent to the investment was implied. She afterwards expressed her dissent, but upon being reminded of her previous letter she ultimately withdrew her opposition, and the matter was carried out as Mr. Kelly wished. His mode of argument is this: "If she had persisted in her refusal, I should have been liable to be sued by the owner of the house for refusing to carry out an agreement I had entered into. I might have become liable to pay damages and costs which I should not have been able to pay, and, in that case, I should have been obliged to become bankrupt; therefore, my wife is guilty of having endeavoured to bring about that result." There is not the slightest ground for imputing to the petitioner an intention in any way to injure her husband much less to bring about so remote an event as his bankruptcy. She appears to have thought the investment an injudicious one, and opposed it; but withdrew her opposition when it was pointed out to her that she had induced her husband to act on her previous implied assent.

The fifth and sixth charges contain the gravamen of the appellant's accusation against his wife, and the facts upon which they are founded seem mainly to have given rise to the animosity which he has manifested towards her. They require therefore, a somewhat fuller examination. These charges are as follows:—"5. She deliberately and defiantly traversed my authority in keeping up a correspondence with a repudiated connexion of mine. 6. She planned with that connexion, to test whether I had not committed a breach of trust, so that my own child might prosecute me." The dissension between the appellant and his son has already been referred to. On the occasion of a quarrel between them, the father used angry and abusive language to his son, who immediately wrote a letter to Colonel Thornbury, the husband of his father's sister, in which he gave his version of what had occurred, and asked his uncle's

advice. Colonel Thornbury wrote in answer a letter—than which nothing could be more kind or judicious. He soothed the son's anger, endeavoured to restore a kindly feeling towards his father by pointing out excuses for his ebullition of temper, and counselled, in the most absolute terms, patience and submission on the part of the son to his father's will, and finished his letter with an invitation to his nephew to return with him to Switzerland, after the termination of a visit which he (Colonel Thornbury) proposed in a short time to make to Mr. Kelly. Mr. Kelly unfortunately became acquainted with this correspondence, by opening a pocket-book of his son, in which a copy of his letter and Colonel Thornbury's answer, were contained. Mr. Kelly made copies of these letters, and replaced the pocket-book where he found it. When Colonel Thornbury paid his promised visit, the appellant reproached him with having written as he had to his son, read to him the draft of a long letter, such as he thought ought to have been written, and not succeeding in convincing Colonel Thornbury that he had done wrong, he finally informed him that, if he did not see his failure of duty to him in writing as he had to his son, all intercourse between their respective families must be severed. This decision the appellant communicated to his wife. It is clear that while Colonel Thornbury was at Liverpool, Mrs. Kelly informed him that she had recently learned from her husband, that a sum of 5500*l.* which had been left to her by her sister some years before, had been invested by him in securities which had proved almost worthless. Desiring to know what her own and her son's legal interest in this legacy was, Mrs. Kelly wrote the following letter to Colonel Thornbury:—

"The Elms,

"Wednesday, Feb. 5th.

"My dear Friend,—It has occurred to me, that if you have leisure, and would take the trouble of going to Doctors' Commons and pay one shilling (twelve stamps I enclose), you could see my sister's will. She died in 1856.

"I think I should like to know if I am right in my recollection of its purport. But if you are busy, never mind it. I saw Clara to-day, she told me to tell you that Mr. Tetley has written to say there is a vacancy in a merchant's office, which he will keep open

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for Bruce for a few days, terms as usual, 100*l.* for five years. This would be better than letting him return to Zurich, as he could throw it up if anything better offered. Ned bids me say his father has refused his consent to his going; in fact he had, before Ned's communication, been applied to, and put no obstacles in the way. I grieve to say matters are no better. How I wish Fred had taken the doctor's advice, and tried at least to make concessions, but I cannot prevail on him, and so the die is cast—what I shall do I know not. I can only look up for support in this time of deep distress. It will be a great comfort to poor dear Clara if Bruce remains. I have only a moment to add that you must not think of taking up your time with our affairs unless you have full leisure.—Yours affectionately, "Frances Kelly."

"Ned's love."

This letter having been answered by Colonel Thornbury, Mrs. Kelly replied:

"Many thanks for your letter and good offices. Poor Fred felt quite hurt at your supposition of his being tempted to do what you feared. But, as I told him, poor human nature is weak.

"Yours ever sincerely and affectionately,

"Frances Kelly."

Unfortunately, Mr. Kelly became acquainted with this correspondence also, by opening with a key of his own, which happened to fit, a drawer in which his wife had locked up the letters. He copied it, as he says, for consideration, and restored it to its place in her drawer. It is upon this correspondence that the appellant bases his charge against his wife of "treachery," of "conspiring" with her "wicked accomplice," Thornbury, to prove her husband guilty of a "heartless breach of trust, so that his own child might prosecute him."

This accusation is repeated in a variety of ways in a series of voluminous letters written and read by the appellant to his wife. In vain has Mrs. Kelly repudiated the charge of harbouring suspicion that her husband had done anything morally wrong, or of having intended to cause her son to take proceedings against him.

But the appellant has remained inexorable, and from the time of his discovery of this correspondence with Colonel Thornbury,

commenced and persisted in the series of acts which cannot be properly designated by any milder term than persecution, and which ultimately led to the institution of the present proceedings. It is difficult to conceive what end the appellant purposed to bring about. It seems that nothing would satisfy him unless his wife would acknowledge the justice of all the terms of opprobrium which he had heaped upon her. Whether, even the most abject confession of guilt, in the sense in which he imputed it, would have mitigated his resentment, may well be doubted. Mrs. Kelly, however, persisted in denying that she had intended any treachery to her husband, and refused to acknowledge that she had intended any wrong against him. We think that she was justified in this refusal. It was natural that a woman should think that money which had been left to her sole and absolute use, was in some way subject to her control, and that she should desire to ascertain her right with reference to it, with a view of saving what remained from the imprudence of her husband. It was necessary for this purpose that she should invoke the assistance of some one, and having regard to the origin and circumstances of her husband's quarrel with Colonel Thornbury, we cannot look upon her appealing to that gentleman, her husband's brother-in-law, rather than to a stranger or an attorney, as deserving of severe reprehension, certainly not as justifying the appellant's subsequent conduct. Mrs. Kelly states that she believed she had received the sanction of a clergyman, a friend of her husband, to the course she adopted in writing to Colonel Thornbury, and although that clergyman afterwards explained that he had not intended to convey such an idea to Mrs. Kelly's mind, we see nothing in the circumstance to make us doubt Mrs. Kelly's statement.

The 7th charge is thus expressed: "She was a party to the imputation of a fraudulent design to me by her brother." This is wholly unfounded. Mrs. Kelly did not, directly or indirectly, impute a fraudulent design to her husband; she was merely the recipient of a letter from her brother, in which he expressed a fear that the appellant might raise money by mortgaging the house which he had resolved on purchasing, out of his wife's trust estate, against her wishes. It does not appear that Colonel Thornbury meant that Mr. Kelly would do so fraudulently, but, even if he had, Mrs.

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Kelly was no party to the imputation by the mere receipt of her brother's letter.

The 8th charge is that after her son left home she burnt the letters she received from him, to prevent the appellant seeing them. Mrs. Kelly states that she did this to prevent further irritation between the father and son, which the letters might have produced, and this appears to us a reasonable and sufficient answer.

The 9th charge is, that she defiantly, before the servants, withheld from the appellant a silver spoon. This is one of those instances to which we have referred in which Mrs. Kelly appears to have acted in a manner which cannot be justified though it may be excused, and the matter is of so trivial a nature that we enter into the details with repugnance. After the appellant's son had been refused permission to enter his father's house, Mrs. Kelly had in her charge a spoon which belonged to her son. The appellant sent a servant for it; Mrs. Kelly refused to give it up, on the ground that it was her son's. The appellant then endeavoured to break into his wife's bedroom to take the spoon from her, and in so doing cracked the panel of the door. Mrs. Kelly seems to have felt that she could not with propriety persist in her refusal, and the spoon was given up. The violence of the appellant deserves to be condemned with at least as much severity as the petulance of his wife.

We now arrive at the last of the charges to which we purpose to refer. "10. When her health required her to have change of air and scene, she refused to have the same with me, and instead, clandestinely decamped, remaining away for nearly six months."

We have already stated our opinion, that the appellant, by his treatment of the petitioner, had so injured her health that her life or reason would have been endangered by her continuing with him. Dr. Drysdale advised that change of air and scene were essential. On the 11th of June the appellant, by letter, gave his consent to Mrs. Kelly leaving home.

On the following day the appellant wrote, "I entirely retract the consent given last evening to your going away from your husband's protection and control." To this the petitioner replied: "I do entreat you to abide by your decision of last night, and let

me go for a little while. If my nerves were strengthened I would return and be able to bear what at present I feel I cannot, of living as I now do, speaking to no one. The result will, I am satisfied, be that I shall go out of my mind. Do let me go for a little, I beg of you."

The appellant, in answer to this appeal, absolutely refused to allow her to leave home, unless with him. The following are the terms in which he conveyed his determination:—"As regards change of air, it is possible you may have it, but it must be with your husband, if I can secure a suitable place. Meanwhile and then, that is, when we get a new servant, and are exposed to the observation possibly of strange servants, to avoid scandal, I will force myself to sit at table with you, traitorous and unnatural as your conduct has been towards me."

The petitioner shortly after left home and went to her relations, with whom she travelled in Wales and Ireland; and after an absence of four months, during which a correspondence was maintained between her and her husband, violent and abusive on his side, conciliatory on hers, she returned home in improved health, soon to be again the victim of a repetition and aggravation of the treatment she had previously experienced. We think that, in leaving her home, the petitioner was influenced solely by a well-founded belief that if she did not do so her life or reason would be imperilled; and we, therefore, hold that it was justifiable.

We deem it unnecessary to follow the appellant through the remainder of his charges against his wife; we have examined them all with attention, and in almost every instance the answers to them which Mrs. Kelly has given, in her letters to the appellant and in her evidence, appear to us satisfactory; and in those few cases in which her conduct may not be entirely free from blame, the observation we have already made is applicable—that her acts were the consequence, and not the cause, of her husband's ill treatment, and whether taken separately or collectively, afford no justification for it.

In conclusion, we have no doubt whatever that the law was correctly laid down on the hearing of this case, that the evidence warranted the conclusion of legal cruelty drawn from it; and

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satisfied, as we are, of the extreme peril to which Mrs. Kelly's health was exposed, without any adequate fault of her own, we think that the interference of this court was justified and necessary, and that the appeal should be dismissed.

THE JUDGE ORDINARY. The appellant has loudly complained that the subordinate facts of this case, and especially the numerous charges made by him against his wife, did not find a place in the judgment now under appeal. It was not needful that they should have done so, and for several reasons. First, these charges of impropriety, or such of them as were established, were, in my judgment, either justified, or at least rendered pardonable, by the appellant's own conduct. Secondly, they were wholly insufficient, if they had been all true and without excuse or palliation, to justify the treatment of which the petitioner complained. And, lastly, they could not (if the quarrel in reference to Mr. Kelly's son and to Colonel Thornbury be accepted) have been the cause of the "affectionate discipline," as Mr. Kelly called it, which he pursued towards his wife, inasmuch as the commencement of that discipline preceded their occurrence.

I do not venture to hope that the views of others, however dispassionate, may suggest to the appellant that he can possibly be wrong in his estimate of all that his wife did. But after the appeal he has made to the Court for the expression of its opinion on this topic, I think it not right to be wholly silent.

I will say a word on each charge that he makes. [His Lordship then referred to each of the charges made by the appellant against the petitioner. It is unnecessary to repeat them, as they are fully set out in the judgment of Channell, B.]

These, then [he continued], are the grave misdeeds which, according to the argument of the appellant, are to warrant this Court in deciding that Mrs. Kelly is to return to her husband, and be subjected again to that discipline which, in the opinion of all who saw her when she last escaped from it (an opinion, be it remembered, that Mr. Kelly does not, even in argument, question) would end in her paralysis or madness. From her husband's leniency she has nothing to hope. He says that he does not desire to injure her, and it has never been asserted that he does. But

still she has nothing to hope, for Mr. Kelly is acting in the discharge of a religious duty. To any feelings of commiseration for his wife's sufferings, which may at last spring up, it will be his duty not to yield. He is obeying, so he told the Court, a higher law; and he protested against this Court interfering with his proceedings, whatever their result, inasmuch as he is acting in discharge of a manifest duty.

If this Court should affirm his views, he will be able to add the sanction of the law to the sanction of his own conscience and the dictates of religious obligation. And, if so, what, I again ask, are Mrs. Kelly's prospects? How many more months of discipline may be necessary to fulfil the expectations of the medical men is, of course, uncertain. But this much is certain, that the appellant has never, either during his wife's residence with him, or since the commencement of this suit down to the present hour, indicated any period whatever as the time at which this treatment of his wife will come to an end.

I have sought in vain in all he has written and said to discover his views on that matter, but I get no further than this—that he demands "repentance." And he was careful in his argument to explain what he means by that term. Speaking of his wife's words of contrition for anything in which she might have offended him, "I was not satisfied," said he, "to have a deep wound skinned over. It was not my duty as a Christian to be so satisfied. There ought to be a weeping out of the offence with sorrow." The offence alluded to was her supposed treacherous designs and conspiracies against him "as revealed in her correspondence" with Colonel Thornbury.

Now, these designs and motives she has consistently and from the very first repudiated. Mr. Kelly has no proof of them, except in the inferences which his judgment enables him to draw, but which I am wholly unable to draw from the terms of that correspondence. And yet he would have his wife confess to feelings which she declares she never had, and designs she never nurtured, weeping out in sorrow a wrong she maintains she has never done. This seems to be held out as the sole escape from a life of indignity, reproach, and isolation, and the only price at which she may preserve her mind or body, or both, from being crippled for

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life. The "lawful obedience and proper self-command by which a wife may secure her own safety," of which the Court speaks in the case of *Dysart* v. *Dysart* (1), does not extend to so monstrous a demand as this. If then, Mrs. Kelly is not bound either in law or morality, to submit to this demand, the question again recurs, what is she to do? If the law will not sanction her living apart from her husband, the instinct of self-preservation must force her to flee from his house. But how is she to be supported? In her own fortune her husband has, under the marriage settlement, a life interest. If she leaves him she is penniless, or a charge on the bounty of her friends. Has the appellant ever seriously considered these results? Does he seriously imagine that any law, divine or human, can justify them?

Nothing in the conduct of the case has surprised me so much as the complacent calmness with which he has from first to last kept out of sight the inevitable results of the course he was pursuing. His wife had done wrong, and it was his duty to make her repent. But what should happen, if repentance did not come? This question seems never to have disturbed his serenity. Here is his own language. In his letter of the 1st of July, 1868, speaking of his wife's conduct in leaving her home for the sake of her health, he thus describes the duty of a Christian wife: "On the contrary would she not say (especially naming the name of Christ as you do), it is not necessary for me to *improve in health, or even to live;* but it is necessary that I should be dutiful in my marriage relation, and not dishonour myself and my husband and create or spread a scandal."

If this passage correctly presents Mr. Kelly's view of his wife's obligations, I am not surprised that he should wholly condemn the interference of this Court for the subordinate purpose of preserving her from serious injury to her health.

I regret to be obliged to remark on one other part of this case. I avoided it on a former occasion, and the appellant has complained of the omission. I allude to the painful correspondence of twenty years ago. It is singular that Mr. Kelly should be so misguided as to insist upon the production of that correspondence. For what does it prove against his wife, except that having been jealous

(1) 1 Rob. at p. 140.

of him, as he said without cause, she did, upon his representations, in the most abject terms beseech his forgiveness; whilst against himself these pitiful letters prove that, in place of forgiveness for a fault so bitterly repented, he offered a harsh and exacting demeanour, withholding his confidence, and at each fresh self-accusation insisting on further abasement. These letters shed some light, indeed, on the respective characters of the parties. They shew Mrs. Kelly to have been at least capable of submission and obedience, while they furnish a fair means of surmising how much her husband was capable of demanding. But what other bearing have they in the case? Literally none, except that Mr. Kelly says they convict his wife of a falsehood in saying, when in the witness box, that she did not feel all she wrote. There never was a case of matrimonial dispute which ultimately depended so little, as the present case does, upon the truth or falsehood of the evidence of the parties themselves. It is due to the respondent, and equally to the appellant, to say that in my opinion they neither of them willingly deviated from the truth in the account of the facts upon which the decision of the Court must rest; nor, indeed, upon those facts is there any essential contradiction.

This old correspondence, then, which ought to have been destroyed long ago, and in no way concerned the disputes now in suit, had no proper place in this inquiry. Strange that Mr. Kelly should have carefully preserved it! Stranger, still, that having done so, he should regard its production by himself as an "interposition of providence."

Thus far upon the facts. On the legal principles involved in this case I have nothing to add to or withdraw from the expressions used in the judgment under appeal. I forbear to cite cases. In my judgment the principles of every case in which the Court has decreed separation on account of cruelty, apply to this case. But as conclusions wide of the truth, and much broader than the judgment warrants, have been sought in argument to be drawn from the words there used, I would add something by way of fuller and further expression.

In determining whether a case is made out for the interposition of the Court reliance is not to be placed on any one feature of the case to the exclusion of the rest. It is not to be said from any-

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thing which the Court has here decided, that this or that is denied to the husband or permitted to the wife. The health and safety of the wife is, no doubt, the leading consideration. Still, it is necessary that due regard should be had, not only to the degree in which that safety or health appears to have been compromised or placed in jeopardy, but to the clearness with which this fact is established in evidence.

So, again, it is necessary that the acts of the husband by which the wife's health or safety is said to have been thus threatened, should not only be proved and the alleged consequences plainly deduced from them, but their motives examined and their causes considered. And, finally, the conduct of the wife herself, by way of provocation, must not only be taken into the account, but her demeanour, under even unmerited oppression or unprovoked cruelty, must be studied by the Court. It is upon the sum of these considerations that the Court can alone decide whether a case is made for a decree.

The appellant affirms that a new law has been made to meet his case, and that it will prove a dangerous precedent. I hope not. To the best of my judgment it is the case which is new and not the law. I have searched the recorded decisions of the matrimonial courts in vain for a case the features of which in any considerable degree resemble the present. It has no parallel in the past; and, as to becoming a precedent, it is hardly likely to find one in the future. So much injustice, so much perversion of mind; such abiding rancour for so trifling a cause; so much deliberate oppression under provocation so slight; moral chastisement so severe, administered with so much system—maintained with such tenacity up to the brink of so perilous a danger to health, with so utter a disregard of consequences—and all to extort confession of motives of which there is no proof, and force repentance without consciousness of wrong, will probably never be exhibited again.

That such a case should recur, it would be necessary that to an inflexible will should be added the power of self-deception in an inordinate degree—so that the promptings of angry resentment should be mistaken for the voice of duty—and that while religion should be put forward to sanction and even enjoin a harsh and

cruel retaliation, the leading precepts of religion, humility, and forgiveness, should be altogether forgotten or but little heeded. 1870

KELLY v. KELLY.

Appeal dismissed with costs.

Attorney for petitioner: *Gregory & Co.*

HARRIS *v.* HARRIS AND MILTON. *March* 17.

Evidence of Petitioner—Corroboration—Practice.

The Court will not act upon the evidence of the petitioner as to the identity of the respondent without some corroboration.

THIS was an undefended petition by a husband for dissolution of marriage. The cohabitation between the respondent and co-respondent was proved by a lodging-house keeper, in whose house they had lived, but the only evidence of the respondent's identity was that of the petitioner himself, who had seen her at the house.

Searle, for the petitioner.

THE JUDGE ORDINARY. There is no corroboration whatever of the petitioner's evidence as to identity. I cannot grant a decree on this evidence without corroboration of any kind.

The hearing was accordingly adjourned. The respondent was afterwards identified by the petitioner's brother in the presence of the lodging-house keeper, and on this evidence a decree nisi was granted.

Attorneys for petitioner: *Lewis & Lewis.*

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Feb. 15.

IN THE GOODS OF SAVAGE.

Codicil—Will Revoked—Codicil not Revoked—1 Vict. c. 26, s. 20.

A testamentary paper in the form of a codicil to a will is not revoked by the revocation of the will. It can only be revoked by one of the modes indicated by the 20th section of the Wills Act.

JOHN SAVAGE, late of Beaufort Buildings, Bath, died on the 9th of January, 1870, leaving a duly executed testamentary paper in the following terms:—

"This is a codicil to my will. After the death of my dear wife, save and except the Colly estate, containing 300 acres more or less, I give all the land I have in the parish of Tetbury, to my son William, absolutely, and I also give to my son William the Vale of Neath Debenture Stock, value 1000*l.*, to cover the bond I have given to Robert Holdsworth and Francis Savage, my son, as trustees of his marriage settlement, for securing the sum of 600*l.* and interest.—Witness my hand this 2nd day of August, 1869, at Mappowder, Dorsetshire.

"Signed by the said John Savage as a codicil to his will, in the presence of us, &c., James William James, farmer, Mappowder; Charles Giles, groom, Mappowder."

The followings facts were disclosed in the affidavits:—On the 2nd of August, 1869, the deceased being then at Mappowder, in Dorsetshire, handed to his son, the Rev. William Savage, a sealed envelope, and told him to keep it. The Rev. W. Savage retained possession of the envelope until the testator's death, and it was then opened, and the codicil was found in it. No will or other codicil could be found, but there was an unexecuted testamentary paper dated in the year 1869. In December, 1869, the testator shewed a rough draft of a will to another son, Francis Savage, who asked what he had done with the original will, and he replied, "To tell you the truth, I have burnt it." There was no other evidence as to the existence of a will.

Pritchard moved for a grant of administration, with the codicil annexed, to Francis Savage, the son and one of the next of kin of the deceased, and cited *Black* v. *Jobling*. (1)

(1) Law Rep. 1 P. & M. 685.

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LORD PENZANCE. I think the grant ought to be made. The question involved in this case was raised in *Black* v. *Jobling* (1), and the Court there reviewed the previous decisions upon it. Before the passing of the Wills Act, the principle was that the codicil fell to the ground with the will when the will was revoked, but that if it could be established that the testator intended the codicil to stand by itself, notwithstanding the revocation of the will, then the Court would give effect to the codicil. At that time the Court entered largely into the question of what testamentary papers constituted the will of the testator, quite independent of the question of their signature by the testator. But then the Wills Act was passed, which expressly enacted (s. 20) that "no will or codicil or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in the manner hereinbefore required, or by some writing declaring an intention to revoke the same . . . or by the burning, tearing, or otherwise destroying the same by the testator with the intention of revoking the same." The Court can not, in the teeth of the language of that section, lay down the proposition that a codicil is revoked by the mere fact of the revocation of the will. If this had been the first case in which the question had arisen after the statute, I should have entertained no doubt that the statute governed it, and that the codicil not having been revoked by any of the modes indicated by the statute, it was entitled to probate. But there have been some decisions on this subject which, as I pointed out in *Black* v. *Jobling* (1), are hardly satisfactory. There are two decisions in Notes of Cases, in which the question was raised: *In the Goods of Halliwell* (2), and *Clogstoun* v. *Wallcott.* (3) In the first case, Sir H. J. Fust said: "The question is, as the will is not forthcoming, what is to be done with the codicil? Now the presumption would be that the will was destroyed by the deceased, supposing it has not been lost or overlooked; and in that case the codicil would, upon the general principle, fall to the ground with the will." The Court there seems to have dealt with the matter quite independently of the words of the statute. In the second case there is this passage in Sir H. J. Fust's judgment: "Under the old law the

(1) Law Rep. 1 P & M. 685. (2) 4 N. of C. 400, 401.
(3) 5 N. of C. 623, 625.

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effect of destroying a will was, by presumption, to defeat the operation of the codicils to the will; by the present law, there must be an intention to destroy." This passage is certainly hardly satisfactory, because the statute says nothing about an intention to destroy, but that the paper shall not be revoked unless it is actually destroyed. When the matter came before this Court in *Grimwood* v. *Cozens* (1), Sir C. Cresswell said: "I think it has been established by the cases cited at the bar, that previous to the passing of 1 Vict. c. 26, a codicil was primâ facie dependent on the will, and that the destruction of the latter was an implied revocation of the former; and moreover, that Sir H. J. Fust was of opinion that no alteration of this principle was made by the passing of the statute." That is certainly not what Sir H. J. Fust said. He said there was an alteration made by the statute, and the alteration consisted in this, that the statute made it necessary to establish an intention to destroy.

It seems to me that the matter was not properly considered in those cases. I said as much in *Black* v. *Jobling* (2), but on looking at the case again, it occurred to me that the meaning of the Court had not, perhaps, been made sufficiently clear. The result is that, in my judgment, the words of this statute are imperative, and that the decisions to which I have referred, since the passing of the statute, do not appear to have proceeded on a consideration of the effect of those imperative words. In this case the testator having left behind him a properly executed testamentary paper, which no doubt is in the form of a codicil, that paper must be admitted to probate, unless it is revoked in some manner indicated by the statute. If a testator destroys his will, and does not destroy his codicil, it appears to me that his intention probably is not to revoke the codicil; but I proceed not on the ground of intention but on the words of the statute. I hold that when a testator has once executed a testamentary paper, that paper will remain in force unless revoked in the particular manner named in the statute.

Motion granted.

Proctor: *J. R. Longden.*

(1) 2 Sw. & Tr. 364, 368. (2) Law Rep. 1 P. & M. 685.

IN THE GOODS OF M. WILLIAMS. 1870

Administration—Proceedings in Chancery—Applicant no direct Interest—Citation—Practice. *April* 26.

A citation ordered to issue against the only person interested in the estate of the deceased, calling upon him to take administration, on the application of a party who was interested in the due prosecution of a suit in Chancery, for which purpose a representative of the deceased's estate was required.

JAMES HUNGERFORD MORGAN, of Tenby, Pembrokeshire, died on the 13th of April, 1851, a bachelor and intestate, leaving Mary Morgan, his sister, and Thomas Sleeman, Elizabeth Briggs, Mary Sleeman, and James Sleeman, the children of another sister, the only persons entitled to his personal estate. On the 24th of May, 1851, Mary Morgan took administration of the goods of the deceased, and the property was sworn by her to be under the value of 1500*l.* Mary Morgan died on the 28th of January, 1852, without having distributed the estate of her brother. She made a will, in which she appointed her niece, Mary Sleeman, sole executrix, who took probate thereof. Mary Sleeman did not take out administration of the unadministered effects of James Hungerford Morgan, but nevertheless possessed herself of a part thereof, which she did not divide amongst the parties entitled thereto. With the exception of some plate and linen, Mary Morgan left no other personal estate than that which had belonged to her brother, of which she was entitled to retain, as her own share, one-half, about 655*l.*, the other half being divisible amongst her nephews and nieces. Mary Sleeman intermarried with William Williams in November, 1857, and died in September, 1863, leaving her husband surviving her, who has not taken administration of her estate and effects. On the 7th of December, 1867, letters of administration of the unadministered estate of James Hungerford Morgan were granted to Thomas Sleeman, as one of the parties entitled in distribution to his property. On the 2nd of September, 1868, a bill was filed by James Sleeman, another of such parties, in the Court of Chancery, for the administration of the estate of James Hungerford Morgan; and on the 14th of November, 1868, a decree was made in such suit, which ordered that certain accounts and

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inquiries should be taken and made, and especially an inquiry whether any and what proceedings should be taken, and by and against whom, for the recovery from the estate of the said Mary Morgan, deceased, of the amounts due from her estate to that of James Hungerford Morgan. In order that the Chancery suit should be effectually carried out, a representation was necessary of the estates of Mary Morgan and Mary Williams.

Dr. Spinks, Q.C., moved the Court to allow a citation to issue against William Williams, calling upon him to accept letters of administration of the personal estate of his wife, Mary Williams, or shew cause why they should not be granted to James Sleeman. [He referred to the cases *In the Goods of Mary Keane* (1); *In the Goods of George Johnson.* (2)]

LORD PENZANCE. It seems to follow, from the necessity of the case, that some mode should be devised of litigating the question, whether, or to what extent, the estate of Mary Williams is liable to the estate of James Hungerford Morgan, and for this purpose a representative of Mary Williams must be appointed. The applicant has no direct interest in her property, but he has an indirect one, and he is entitled to take out a citation against the husband. It will be for after-consideration, if a grant of administration be made to him, whether or not it should be limited, and to what extent.

Solicitors: *Thomas White & Sons.*

(1) 1 Hagg. Ecc. 692. (2) 2 Sw. & Tr. 595.

IN THE GOODS OF WILLIAM HARRIS.

1870
May 3.

Two Wills; One limited to Property in England, the other to Property in Tasmania—Separate Executors—Probate—Practice.

The deceased executed a will purporting to dispose of, and in fact disposing only of, property in Tasmania, and appointed thereby executors resident in Tasmania. He subsequently executed another will disposing of his property in England, and thereby ratified and confirmed the will relating to the property in Tasmania. In this last will he appointed three executors distinct from those named in the earlier will. The Court ordered probate to issue of both papers as together containing the will of the deceased.

WILLIAM HARRIS, late of Leamington Priors, Warwickshire, died on the 7th of August, 1869. He executed two wills dated respectively the 24th of May, 1867, and the 16th of July, 1867. The first commences: "This is the last will and testament of me, William Harris, late of Hobart Town, in Tasmania, and a brassfounder there, but now out of business, and living at Leamington Priors, in the county of Warwick, whereby I desire and intend to dispose of my property in Tasmania only, leaving my property in England to be disposed of by a separate will." It then names three persons (described as resident in Hobart Town) executors, and directs them to transfer the residue of the deceased's personal estate in Tasmania to the executors of his English will, to be by these last gentlemen invested. The first will relates only to property in Tasmania. The second will commences: "This is the last will and testament of me, William Harris, now residing at Eden Villa, in Leamington Priors, in the county of Warwick, gentleman, late of Hobart Town, in Tasmania, so far as regards my property in England, I having, by a separate and distinct will, disposed of my property in the colony of Tasmania, and which will I ratify and confirm by this will; and I desire that the same may not be annulled, interfered with, or affected by this will." The deceased, by this will, disposes of his property in England, and appoints three persons executors, no one of such persons being named in the earlier will as executor. This will was proved in the district registry at Birmingham on the 13th of October, 1869, and the property in England sworn under 12,000*l*. On the first will being taken to

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the proper office at Hobart Town, in Tasmania, for probate, it was refused on the ground that that document is only a part of the deceased's will. That, of whatever number of executed documents the will consists, they cannot be separated, and must all be proved together, as together constituting one will. The authorities in Tasmania suggested that application should be made to the Court of Probate in this country for the revocation of the probate already granted, and that the English and Tasmanian wills should be proved together. Such a practice they consider to have been established in the case of the will of Bishop Willson (November, 1864).

April 26. *Pritchard* moved accordingly. He presumed, however, that as the will of the 24th of May, 1867, only refers to the Tasmanian property, and the executors named therein reside in that colony, and the will of July, 1867, disposes of the English property only, and by it other executors are appointed, the Court, following the decision in *In the Goods of Coode* (1), will reject the motion.

[LORD PENZANCE. In the present case the English will ratifies and confirms the Tasmanian will. Is not the latter thereby incorporated in the former?]

If the Court is of that opinion, it will revoke the grant already made, and decree probate of the two documents as together containing the will of the deceased.

May 3. THE COURT, having referred to the proceedings in the case cited in *In the Goods of Bishop Willson* (2), directed that the probate granted of the will bearing date the 16th of July, 1867, be revoked, and that probate should issue of the papers dated the 24th of May, 1867, and the 16th of July, 1867, respectively, as together constituting the will of the deceased.

Attorneys: *Church, Jones, & Clarke.*

(1) Law Rep. 1 P. & M. 449.

(2) Nov. 1864; not reported.

MORTIMER *v.* PAULL AND PAULL. 1870

Testamentary Suit—Appointment of Executor not disputed—Administrator pendente lite—Practice. *May* 5.

The deceased executed a will and two codicils, and by the will he appointed executors. A suit was instituted to try the validity of the second codicil only; such codicil in no way affecting the appointment of executors. The Court refused to appoint an administrator pendente lite.

CHARLES MORTIMER, of Weston-super-Mare, Somersetshire, died on the 1st of November, 1869. On the 22nd of December, 1868, he executed a will in which he named the plaintiff, Charles Edward Mortimer, his son, and Henry Paull, executors. By this will he gave the residue of his property equally between the plaintiff and his daughter, Agnes Bertha Paull, one of the defendants. On the 23rd of December, 1868, and on the 31st of August, 1869, he executed a first and second codicil to his will. By the last he revoked the bequest of residue to his daughter, and left the whole thereof to the plaintiff; but he did not thereby affect the appointment of executors. The defendants having entered a caveat, the plaintiff propounded the will and two codicils of the deceased. The defendants did not oppose the will and first codicil; but, as regards the second codicil, they pleaded that it was not executed in accordance with the provisions of the statute 1 Vict. c. 26; that the deceased on the day it was executed was not of sound mind; that it was obtained by the undue influence of the plaintiff; and that the deceased, at the time of its execution, did not know and approve of its contents.

The questions at issue between the parties were ordered to be tried before the Court and a special jury.

April 26. *Inderwick*, for the defendants, moved that an administrator, pendente lite, be appointed. The deceased was trustee of certain properties, and the parties beneficially interested in the trusts are threatening the executors with legal proceedings. Moreover, there are certain debts due to the deceased's estate, which it is desirable should be got in at once.

Searle, for the plaintiff, opposed the motion. It is contrary to practice to appoint an administrator pendente lite, where there is

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an executor willing to act, whose appointment is not in dispute. The defendants have already applied to the Court of Chancery for the appointment of a receiver of the deceased's estate, and their application has been refused on this very ground: *Paull* v. *Mortimer*. (1) The powers and authority of an executor, before he has obtained probate, are greater than those of an administrator pendente lite: Williams on Executors, part 1, bk. 4, ch. 1, s. 2 (6th ed.), p. 291.

May 5. LORD PENZANCE. When an administrator pendente lite is appointed by the Court, it is in order that he may discharge certain necessary functions which there is nobody else to discharge. The Court of Chancery has refused to appoint a receiver in this case, and I must do the same, for there is a person named in the will as executor, whose appointment is not questioned, who can discharge these functions. In order to found the present application, it must be shewn to me that there is something to be done that this man as executor cannot do. I am not satisfied of that, and therefore I must reject the motion with costs.

Attorney for plaintiff: *W. H. Waller.*
Proctor for defendants: *Toller.*

May 10.

IN THE GOODS OF THE REV. J. G. RYDE.

*Scotch Confirmation—Sealed in England—Property in England not covered by First Grant—Additional Confirmation—Re-sealing—Practice—*21 & 22 *Vict. c.* 56, *ss.* 12, 16.

The deceased died domiciled in Scotland, and a confirmation issued from the proper officer to the widow, as executrix dative quâ relict of the defunct, on her filing an inventory of the property of the deceased, distinguishing which portion thereof was situated in Scotland, and which in England. This confirmation was sealed in the registry of the Court of Probate in England. Subsequently it was discovered that the deceased had left other property in this country, and on an additional inventory of such property being filed, an eik, or additional confirmation, was granted in Scotland to the widow. The Court ordered the seal of the Court of Probate to be attached to such additional confirmation.

THE Rev. John Gabriel Ryde died at Melrose, Roxburghshire, Scotland, on the 7th of December, 1868, being at that time domiciled

(1) Weekly Notes, 1870, p. 102.

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in Scotland. On the 23rd of February, 1867, he duly executed a will, in which he left certain property to his wife, Mrs. Emmeline Ryde, but did not thereby appoint any executor, or dispose of the residue of his estate. Mrs. Ryde having filed an inventory of the personal estate, wheresoever situated, of the deceased, at the proper office at Jedburgh, in which she specified separately the value of the property in England and Scotland, on the 4th of March, 1869, a confirmation issued under the seal of the Commissary of Roxburghshire constituting Mrs. Ryde executrix dative quâ relict to the defunct, with full power to administer the estate of the deceased. In the inventory the property in Scotland was valued at 1598*l.* 8*s.* 10*d.*, and in England at 1942*l.* 2*s.* 9*d.* This confirmation was sealed with the seal of Her Majesty's Court of Probate in England, on the 24th of March, 1869. In July, 1869, in consequence of the death of the mother of the deceased, a reversionary interest to the value of 10,722*l.* 14*s.* 7*d.*, in property situated in England, became due to the representative of the deceased, no portion of which was included in the inventory filed by Mrs. Ryde. Thereupon a further inventory was given in or recorded in the Commissary Court at Jedburgh, and an eik, or additional confirmation, issued to Mrs. Ryde under the seal of the Commissary of Roxburghshire on the 26th of February, 1870. On this additional confirmation being taken into the registry of the Court of Probate, the registrar refused to seal it.

Dr. Spinks, Q.C. (*Pritchard* with him), moved the Court to order the seal of the Court of Probate to be affixed to the additional confirmation. The registrars consider that this case is governed by certain decisions given by Sir C. Cresswell, but there is a material difference between those cases and the present. In the cases *In the Goods of Colonel Gordon* (1), and *In the Goods of Andrew Wingate* (2), the parties did not contemplate, when they took out the original confirmation, including the property in England at all, and therefore the original inventory set forth no property in England, and the additional confirmation did not include the personal estate in Scotland besides the personal estate in England, as required by the Act. In a third case, *In the Goods*

(1) 2 Sw. & Tr. 622; 29 L. J. (P. M. & A.) 67.

(2) 2 Sw. & Tr. 625.

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of Hutcheson (1), the original inventory did not distinguish which part of the property was in Scotland, and which in England. In the present case the original inventory was properly framed, and the confirmation granted thereupon extended to the deceased's estate in England. The 21 & 22 Vict. c. 56, s. 16, incorporates with itself the provisions of 48 Geo. 3, c. 149, relating to inventories in Scotland, and makes them applicable to inventories in which the whole of the personal and moveable estate of the deceased, wheresoever situate in the United Kingdom, is included. By 48 Geo. 3, c. 149, s. 38, it is enacted, that if after a confirmation has issued other property belonging to the deceased be discovered, a fuller and further inventory must be exhibited on oath, and recorded in the proper commissary court, under a penalty of 20*l.* The proceedings in this case have been taken in accordance with the provisions of that statute. There is a further distinction between this case and those decided by Sir C. Cresswell. In the latter the parties, when the Court refused to seal the additional confirmation, were able to obtain separate probates or administration in this country, but the present applicant cannot do so.

LORD PENZANCE. I think this application ought to be granted. Possibly if I had had to decide in the first instance the cases which were brought before Sir C. Cresswell I should not have come to the same conclusion that he did, but if those cases had been in point, I should have felt bound to follow the rules laid down by my predecessor; I think, however, the distinction taken by counsel is correct. In the other cases the original confirmation did not extend to the property in England, or was not stated to do so in the grant itself; in this case the original inventory and confirmation were drawn in strict conformity with the provisions of the statute, and was framed to cover both Scotch and English properties. Subsequently an additional confirmation issued, because it was found that a portion of the estate of the deceased had not been included in the former grant. It clearly was the intention of the statute, referring as it does to and incorporating the preceding statute, 48 Geo. 3, c. 149, that under such circumstances a fresh inventory should be filed, including the value of the estate

(1) 3 Sw. & Tr. 165; 32 L. J. (P. M. & A.) 167.

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comprised in the former one, and that the parties should apply to the court from whence the original confirmation issued for an additional confirmation. It is now right, therefore, that the seal of this court should be attached to that additional confirmation which relates to a portion of the joint estate. These are circumstances which did not exist in the cases decided by Sir C. Cresswell. The application is granted.

Attorney: *D. E. Forbes.*

IN THE GOODS OF E. S. HILL.

May 17.

*Administration with the Will annexed of Unadministered Estate — American Domicil—Grant in America to a party not entitled to it by law of England—Following Foreign Grants—Practice—*20 *&* 21 *Vict. c.* 77, *s.* 73.

When the deceased is domiciled in a foreign country, and an application is made to this Court, either for an original or a de bonis grant of administration, this Court will be prepared to make it to the person recognized by the proper Court of the foreign country.

ELEANORA SARAH HILL, late of Walnut Cottage, Newcastle County, State of Delaware, America, spinster, died in the year 1864, leaving a will dated the 24th of October, 1857, in which she nominated her father, Thomas Finnimore Hill, her sole residuary legatee and executor. He proved the will in America on the 28th of September, 1864, and died there on the 8th of December, 1869. By his will dated the 31st of July, 1865, he appointed his daughter Maria Frances Anderson, William McCouch, and Horatio Gates, all domiciled in America, executors, who have proved the testator's will there. Since the death of Thomas Finnimore Hill, letters of administration, with the will annexed, of the unadministered estate of Eleanora Sarah Hill have been granted, at the request of the executors of Thomas Finnimore Hill, to the Reverend George Washington Anderson, the husband of Maria Frances Anderson. Some property in England being now divisible, by reason of the death of Thomas Finnimore Hill, amongst his daughters, a representation to the estate of Miss Hill in this country is required. The executors have sent over to England a document, signed by them in the presence of a British consul, stating that the grant has

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been made in America to the Reverend George Washington Anderson, at their special instance and request, and expressing a desire that the grant in England should be made to him also.

Dr. Spinks, Q.C., moved the Court to decree administration to Mr. Anderson, as the party who had been so appointed by the Court of the country of domicil.

May 17. LORD PENZANCE. In this case I took time to consider the effect of certain documents which had been sent over from America. A grant of administration of the unadministered estate of the deceased has been made in that country, and the party who obtained it applies to this Court for a grant to enable him to get possession of the assets of the deceased in England. I have before acted on the general principle that where the Court of the country of the domicil of the deceased makes a grant to a party, who then comes to this Court and satisfies it that, by the proper authority of his own country, he has been authorized to administer the estate of the deceased, I ought, without further consideration, to grant power to that person to administer the English assets. In this case the property to be administered forms part of the estate of the deceased's father, who is now dead, and, according to the practice of this Court, a representation should first be taken to his estate. It so happens that, in this respect, the law of America coincides with that of England. The question then arises, whether it is necessary that I should order such a representation to be constituted. I think not. I think I ought to carry out the principle in its integrity; and where I find the proper Court in America has given to an individual authority to administer the estate of a person who has died domiciled in America, I should acknowledge that fact as the basis of my proceeding, and decree administration to the same person in this country.

Attorneys: *King & McMillin.*

IN THE GOODS OF G. G. MERCER. 1870

Will in India—Copy thereof referred to and confirmed in a Codicil—Incorporation of Copy. *May* 17.

The deceased executed a will in India, which was deposited in a bank in that country. Subsequently, in this country, he executed a codicil to his will, which contained the following clause: "Of which will I, along with this codicil thereto, execute a copy, and homologate and confirm the same in all particulars, except in so far as altered or revoked by this codicil." At the time of the execution of the codicil the deceased produced a paper, which he informed the witnesses was a copy of his will:—

Held, that the copy will so produced was incorporated in the codicil.

GEORGE GRÆME MERCER, formerly of Futtyghur, East Indies, indigo planter, died on the 29th of October, 1869, at Aberfeldy, Perthshire. He executed a will, dated the 7th of November, 1865, in which he appointed Stewart Gardner and Cuthbert Cooke executors. This will was deposited by the deceased at the Bank of Bengal, Calcutta, and still remains there. No application has been made to the Bank of Bengal to obtain this document, but it was suggested that the English executors, hereinafter referred to, would probably have a difficulty in getting it out of the custody of the bank, and have no legal right to compel its production. The deceased left India in 1867, and in August and September, 1869, was temporarily resident in Scotland. On the 21st of August, 1869, the deceased executed, in the presence of two witnesses, a codicil which commences: "This is a codicil to the last will and testament of George Græme Mercer, formerly at Futtyghur, in India, presently residing temporarily at Ballachin, in Perthshire, retired indigo planter, dated the 7th of November, 1865, and of which will I, along with this codicil thereto, execute a copy, and homologate and confirm the same in all particulars, except in so far as altered or revoked by this codicil." By this document the deceased appoints Philip Simon and John Simon executors for England, or in the island of Jersey, conjointly with the executors named in his will. He gives certain directions to the trustees and executors named in his will in India, and he concludes: "In all other respects not affected by this codicil I ratify and confirm my said will." At the time of the execution of this codicil the deceased

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produced and shewed to the witnesses a document which he informed them was a copy of his will. He subsequently executed two other codicils, dated the 13th and the 22nd of September, 1869, respectively, each of which professes to be a codicil to his last will and testament dated the 7th of November, 1865. Within two months of his death the deceased gave John Simon the copy of his will and the codicils, and informed him that the original will was deposited at the Bank of Bengal, and that the copy he gave him was a correct copy thereof. This copy has written at its foot the following memorandum: "This is a copy of my last will and testament referred to in the codicil signed by me this 19th day of August, 1869. G. G. Mercer." According to this copy there was no clause of revocation in the will. No codicil was executed by the deceased on the 19th of August, 1869.

Inderwick applied for probate of the copy will and three codicils. The copy will is clearly incorporated in the first codicil, and must be admitted to probate, even although the original will should be too. There is an urgent necessity for a grant to be made at once, and great delay may arise in getting the original will from India.

May 17. LORD PENZANCE. I took time to consider the effect of the several testamentary instruments in this case. There is first a will, which has been deposited in a bank in India. There is also a copy of such will, which was not, however, duly executed, that is to say before witnesses, in accordance with the requirements of the statute. But there is a codicil which refers to and confirms a paper in terms sufficiently distinct to enable the Court to ascertain with certainty to what it does refer, and that paper is the copy of the will. The copy, then, being so referred to, and in such terms that the Court can recognize it without any chance of failure, it is incorporated with the codicil, and the Court will follow the ordinary rule in granting probate of this copy will as incorporated in the codicil. By taking this course much trouble may be saved in getting the original will from India.

Attorneys: *Thomas & Hollams.*

PAUL *v.* PAUL AND FARQUHAR. 1870

June 7.

Dissolution of Marriage—Settlement—Whole Property settled by Respondent's Father—22 & 23 Vict. c. 61, s. 5—Dividends due before Order.

On the marriage of the parties (which marriage was subsequently dissolved by reason of the adultery of the wife) the father of the respondent settled property, in the first place, for the benefit of his daughter for life, then for the benefit of her husband, and on the death of the survivor of them, for the benefit of their children. No property was settled on behalf of the petitioner. The Court varied the settlement by ordering the whole income of the settled property to be applied during the joint lives of the petitioner and respondent for the benefit of their children.

The Court has no authority to alter the destination of dividends due and payable before the date of its order.

ALBERT SAINT PAUL was married to the respondent Lucy Paul on the 29th of November, 1859; and on the 8th of June, 1869, the marriage was dissolved by reason of her adultery with Captain Duncan Anderson Farquhar, the co-respondent. Three daughters were born of the marriage, now respectively eight, six, and two years of age. On the 22nd of July, 1869, the respondent intermarried with the co-respondent. On the 15th of October, 1869, the petitioner presented a petition under 22 & 23 Vict. c. 61, s. 5, praying the Court to vary the trusts of certain settlements made in anticipation of and during his marriage, and the respondent answered this petition on the 2nd of December, 1869. The instruments referred to in the petition consisted of articles of agreement in contemplation of the marriage dated the 28th of November, 1859, and a deed of settlement purporting to be executed in accordance with such articles on the 27th of November, 1866. The articles of agreement were entered into by Mr. Thomas Bennett O'Callaghan, and the respondent, his daughter, of the first part, the petitioner of the second part, and Charles Paul and Henry L'Estrange Saunders, as trustees, of the third part. By the articles Mr. O'Callaghan agreed during his natural life to pay to the trustees 150*l.* per annum in trust for the petitioner during his life, and after his death, for the respondent during her life, and after the death of the survivor in trust to apply the same for the benefit of the children of the marriage in such manner as the petitioner and respondent should jointly by deed

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appoint, and for want of such appointment as the survivor of them should by deed or will appoint, and in default thereof to pay the same equally between such children, to the sons at twenty-one, and to the daughters at the like age, or on the days of their marriages, respectively, which event should first happen, with benefit of survivorship, and if all such children should die before attaining such age, or, being daughters, before marriage, then after the decease of the survivor of the petitioner and respondent in trust for Mr. O'Callaghan, his executors, administrators, and assigns. Mr. O'Callaghan further agreed that within eighteen months from the marriage, he would secure to the trustees such annuity during his life, and also a sum of 2550*l.*, which, with a sum of 450*l.* (advanced to the petitioner at the time of marriage by Mr. O'Callaghan, and to be refunded to the trustees, security having been given for repayment), was to be held on the same trusts as the annuity. By the settlement executed the 27th of November, 1866, it was recited that Mr. O'Callaghan, in lieu of the annuity, had assigned, transferred, or delivered to the trustees certain specified securities and moneys in value amounting to 3000*l.*, and it was provided that the income thereof should be paid to the respondent for life, and during coverture, for her sole and separate use, without power of anticipation, and on the death of the respondent if the petitioner survived her, and had not been outlawed or become bankrupt, and had not assigned or encumbered the dividends, interest, or income, or done or suffered anything whereby the same would, through his act or default, or by operation or process of law, if belonging absolutely to him, become vested in or payable to some other person, the trustees should pay the income and dividends thereof to him for his life, or until he should be outlawed, &c. And on the death of the respondent, and failure of the trusts in favour of the petitioner, the trustees, in their discretion, might apply the dividends or part thereof towards the maintenance and personal support of the petitioner and his wife (if any), and of the child or children and other issue for the time being in existence (whether by his then or any future wife), and on the death of the petitioner the property was divisible amongst the children of the marriage in the same manner as in the articles. Power was also given to the trustees, after the death of the respondent, and on failure of the trusts in

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favour of the petitioner, to apply the whole or any part of the income (at their discretion) of the share which any child of the marriage should for the time being be entitled to in expectancy for his or her maintenance and education. As the settlement did not accord with the articles of agreement, an application was made to the Court of Chancery, and a decree was made on the 11th of February, 1869, declaring that the variations made by the settlement in the estates for life contained in the articles were valid and binding on all parties, and that on Charles Paul and Henry L'Estrange Saunders retiring from the trust, Charles Major and Edward Theodorus Paul be appointed in substitution. The petition was referred to one of the registrars of the Court of Probate, who made his report on the 11th of May, 1870. From this report it appeared that it was proposed by the petitioner that the respondent's life interest in the settled property should be extinguished during the joint lives of the petitioner and respondent, and that during that period the trustees should pay or apply one third of the dividends and income of such property for the benefit of the petitioner, and the remaining two thirds for the benefit of the children of the marriage.

May 17. *Dr. Deane, Q.C.* (*W. G. Harrison* with him), applied to the Court to order the settlement to be varied in accordance with this proposal. He referred to *March* v. *March*. (1)

Pritchard, for the respondent, objected to the proposed alteration of the settlement. One third the income should be reserved for the respondent, and not given to the petitioner, or if the whole income is to be taken from her it should be all settled on the children. The whole settled property was derived from the respondent's father.

E. S. Dunn appeared for the trustees.

June 7. THE JUDGE ORDINARY. I took time to consider what alterations should be made in the settlement which was entered into on the marriage of these parties. The petitioner asks that a portion of his wife's life interest should be made over to him, and that the rest should be applied for the benefit of the children of

(1) Law Rep. 1 P. & M. 440.

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the marriage. On the other side, the respondent desires that the whole should be given to her children. The only property affected by the settlement belonged to the wife's father and produces about 150*l.* per annum. Under the settlement the respondent takes the first benefit. On her death, subject to certain contingencies, the petitioner will be entitled to a life interest in the fund; on the death of the survivor it will belong to the children of the marriage. The circumstances proved at the hearing disclosed the worst possible conduct on the part of the respondent towards the petitioner. She kept up an adulterous intercourse with the co-respondent, and at the same time treated her husband with great contumely and contempt. Since the decree has been made absolute she has married the co-respondent. I shall have no hesitation, therefore, in dealing with this 150*l.* per annum in such a way during her life that no part shall go to her. The question then arises, whether any part should be paid to the petitioner? I have come to the conclusion that the whole shall be applied for the benefit of the children during the joint lives of the petitioner and the respondent. On the death of the respondent in the lifetime of the petitioner, the petitioner will enjoy the benefits given him by the settlement. If any dividends are now payable to the trustees they must be applied in the way I have stated.

June 21. *Dr. Swabey* moved the Court to order the registrar to draw up the order in accordance with the above decision. This motion has become necessary, because the registrar has refused to draw up that portion of the order which relates to the dividends due and payable to the trustees at the time the motion was made.

THE JUDGE ORDINARY. The registrar has called my attention to the fact that under the statute I have no power to make a retrospective order. The statute says that after a final decree the Court may make such orders, with reference to the application of the whole or a portion of the property settled, as to it may seem meet. The destination of the fund is permanently secured by a deed, and the legal destination of such fund will continue the same until altered by an order of this Court. It is the true principle, I think, that up to the date of an order whereby a new destination

of settled property is effected, it shall follow the destination mentioned in the deed, and the person who, by the deed, is entitled to the benefit, shall obtain it up to that time. Otherwise, I may interfere with vested interests. It is my better judgment that I had no power to make that part of the order which referred to the dividends then payable to the trustees.

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Motion rejected.

Attorneys for petitioner: *Purkis & Perry.*
Attorneys for respondent: *Clark, Woodcock, & Ryland.*

IN THE GOODS OF J. W. PUDDEPHATT.

June 7.

Will—Execution—Name of Testator below Names of Witnesses—No Evidence as to order in which Names written.

The will of the deceased had an imperfect attestation clause, and the name of the deceased appeared written beneath the signatures of the attesting witnesses. The witnesses were both dead, and no evidence could be given as to the order in which the signatures were made. The Court, nevertheless, decreed probate of the will.

JOHN WARNER PUDDEPHATT, otherwise John Eyles, of Church Street, Luton, Bedfordshire, tailor, died on the 15th of December, 1858, having made a will, dated the 30th of June, 1857, and therein appointed his sons George Eyles and John Eyles executors. The will concludes as follows:—

Signed by the said John Warner Puddephatt (commonly called John Eyles), in the presence of, and by the direction of, the said John Warner Puddephatt, the testator, as his last will and testament, and such signature acknowledged by him in the presence of	Thomas Tomlinson. John Craker. John Eyles.

An affidavit was filed, which stated that the witnesses are both dead, and that no one else can be found who was present at the execution of the will. The handwriting of the deceased and of the witnesses respectively was proved.

Searle moved for probate of the will. The position of the sig-

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nature is admissible, under the provisions of the statute 15 Vict. c. 24; and, in the absence of direct evidence, the Court will assume, from the wording of the attestation clause, that the will was duly executed.

THE COURT decreed probate of the will.

Attorney: *T. Sismey.*

May 31.

MYCOCK *v.* MYCOCK.

Suit for Dissolution—Cruelty and Adultery proved—Alteration of Prayer—Right of Respondent to Oppose—Practice.

A wife, having presented a petition praying for a dissolution of her marriage by reason of the cruelty and adultery of her husband, at the hearing proved both charges. The decree was suspended at her request, and on applying for a decree for judicial separation instead of a decree nisi for dissolution, the respondent opposed the application.

The Court refused to allow her to alter the prayer of her petition until the respondent had had an opportunity of bringing before the Court the facts on which he grounded his opposition.

THE petitioner, Ann Mycock, petitioned the Court to dissolve her marriage with the respondent, Thomas Mycock, by reason of his cruelty and adultery. He answered, denying the charges, and alleging that he was provoked to the divers acts of cruelty, if any committed by him, by the violent, irritating, and abusive conduct of the petitioner; and further, that she had condoned the several acts of cruelty and adultery she had charged against him.

The questions in issue between the parties were ordered to be tried by the Court and a common jury, but, by consent, that order was discharged, and on the 12th of May the petition was heard before the Judge Ordinary alone, when he pronounced that the petitioner had sufficiently proved the contents of her petition, but, at her request, suspended the decree.

Dr. Spinks, Q.C. (*Pritchard* with him), now moved the Court to pronounce a decree of judicial separation.

Dr. Deane, Q.C., for the respondent, opposed the motion. The respondent has received information that the petitioner has been herself guilty of adultery. If so, it will amount to a compensatio

criminis, and the petition must be dismissed. He asked that the motion might stand over for a fortnight.

Dr. Spinks objected that the respondent had no right to be heard on this question at all, more especially as he had filed no affidavits on which to found his application for delay.

THE JUDGE ORDINARY. In the case of *Boreham* v. *Boreham* (1) the wife brought a suit for dissolution of marriage by reason of her husband's adultery, cruelty, and desertion. She proved his adultery, but failed to prove cruelty and desertion. I was then asked to grant to her a judicial separation, which I refused, and dismissed the petition, because the petitioner had been shewn to have been guilty of misconduct which, under the 31st section of 20 & 21 Vict. c. 85, gave the Court a discretionary power to dismiss the petition. I must proceed on the same principles in all these cases. Although at the commencement of suit a petitioner may have prayed for a dissolution of her marriage, if no injustice can arise to the other side, and I see no other impediment, and she asks permission at the hearing to alter her prayer, I will grant the application, but if the other side object, and say they have got a defence, I will not alter the petition or the remedy sought until I have heard that defence. If the petitioner had kept to her original prayer, the respondent might have given information to the Queen's Proctor at any time within six months. She has only to-day applied for leave to alter the prayer of her petition, and the respondent merely asks that the matter may stand over for a fortnight, in order that he may pursue certain inquiries. I ought not to allow the prayer of the petition to be altered at present, for thereby I may do an injustice to the respondent.

Proctor for petitioner: *A. Ayrton.*

Attorneys for respondent: *Gregory, Rowcliffes, & Co.*

(1) Law Rep. 1 P. & M. 77.

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May 31.

VIVIAN *v.* VIVIAN AND THE MARQUIS OF WATERFORD; LESLIE INTERVENING.

Dissolution of Marriage—Decree Nisi—Intervention of one of the Public—Costs—23 & 24 Vict. c. 144, *s.* 7.

1 P.D. 67

After a decree nisi for a dissolution of marriage, affidavits were filed by a private individual under the 7th section of 23 & 24 Vict. c. 144, setting out facts to induce the Court not to make the decree absolute. At the last moment the intervener withdrew his opposition, and the decree was made absolute:—

Held, that the Court has no power to condemn an intervener in the costs of his intervention.

IN this case the petitioner applied to the Court to dissolve his marriage with the respondent by reason of her adultery, and a decree nisi to that effect was made on the 4th of August, 1869. In January, 1870, Colonel Charles Powell Leslie intervened, and filed affidavits to shew that material facts had, at the hearing, been kept from the knowledge of the Court. On the 26th of April, application was made to the Court that the decree nisi should be made absolute, when counsel on behalf of the intervener stated that he did not oppose the motion. The Court, however, ordered that the motion stand over to enable the Queen's Proctor to intervene, if he should think proper to do so.

May 17. *Archibald*, for the Queen's Proctor, announced to the Court that the Queen's Proctor, under the direction of the Attorney General, declined to intervene.

Sir J. D. Coleridge, S. G. (*Dr. Swabey* with him), moved that the decree be made absolute, and that the intervener be condemned in the costs of his intervention: 20 & 21 Vict. c. 85, s. 51.

Sir G. Honyman, Q.C. (*Searle* with him), for Colonel Leslie, the intervener. The Court has no power to condemn an intervener in costs: 23 & 24 Vict. c. 144, s. 7; *Lautour* v. *Lautour* (1); *Bowen* v. *Bowen* (2); *Forster* v. *Forster*. (3)

May 31. THE JUDGE ORDINARY. I took time to consider whether

(1) 10 H. L. C. 685; 33 L. J. (P. M. & A.) 89.
(2) 3 Sw. & Tr. 530; 33 L. J. (P. M. & A.) 129.
(3) 3 Sw. & Tr. 151; 32 L. J. (P. M. & A.) 206.

I have the power, and if so, whether I ought to condemn the intervener in the costs arising from his intervention. Now, certainly, the intervention or interference in this suit has turned out to be unfounded, the charges cannot be sustained, and the effect is, that unnecessary delay has been occasioned in making the decree absolute. So far, therefore, as I have any discretion, I consider that the intervener ought to pay the costs; and I should not hesitate to order him to do so, but it is argued I have no power to make such an order, and the 7th section (23 & 24 Vict. c. 144) is referred to, under which the appearance of third parties is founded. In that section there is no provision as to costs on either side, except where the Queen's Proctor intervenes and pleads collusion. No other person is entitled to costs under that section, there are no provisions relating to them. But in the original Divorce Act (20 & 21 Vict. c. 85), there is a general clause on this subject (s. 51): "The Court, on the hearing of any suit, proceeding, or petition under this Act, may make such order as to costs as to such Court may seem just;" which gives to the Court an unlimited discretion in the matter, and I should have been inclined to conclude that under that section I could have condemned any person intervening in the costs. The decision, however, in *Lautour* v. *Lautour* (1), is antagonistic to this view, for I find no escape from the conclusion that it was there decided that if a private individual intervenes, there can be no order for costs on either side. I am bound by this decision, and must reject the motion to condemn the intervener in costs. I am the more satisfied that I ought to do so, because the intervener would have no appeal if I were to decide otherwise.

Attorneys for petitioner: *Lanfear & Co.*
Attorneys for respondent: *Duncan & Co.*
Attorneys for intervener: *White, Broughton, & White.*

(1) 10 H. L. C. 685; 33 L. J. (P. M. & A.) 89.

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May 31.

IN THE GOODS OF JOSEPH EDWARD O'LOUGHLIN.

Will—Residue—"Effects."

A testator left to A. whatever money remained at his agent's, and also any money that might result from the sale of his effects:—

Held, that A. was not entitled to administration as a residuary legatee.

JOSEPH EDWARD O'LOUGHLIN, late of the Royal Hospital, Netley, Hampshire, assistant surgeon, died on the 13th of April, 1870, having executed a will dated the 2nd of April, 1870, in which no executor was appointed. The will commenced thus: "This is my last will and testament. I leave whatever money remains at my agents, Sir John Kirkland & Co., and Messrs. Cox & Co., to my cousin, Miss O'Loughlin, 19, Campden Hill Road, Kensington; also any money that may result from the sale of my effects, after paying the few small debts I owe. I also wish her to get my watch, &c." The only other bequests in the will were of a set of studs, a gold pencil case, and a ring. The whole property left by the deceased consisted of money at his agent's, 241*l.* 5*s.* 3*d.*, and effects valued at 50*l.* The deceased left a brother living in America, and a sister, the only persons entitled to his property in case he should have died intestate.

Searle moved the Court to grant administration with the will annexed to Miss O'Loughlin, as residuary legatee named therein. The word *effects* is sufficient if it stands alone, and is not limited by the context to pass the whole residue: *Campbell* v. *Prescott* (1); Williams on Executors, 6th ed. p. 1095.

LORD PENZANCE. The words are, *money that may result from the sale of my effects.* Effects must mean, therefore, something that may be sold, but a legacy would not be included in such a definition. I think by the word *effects*, the deceased alluded to that portion of his property only which was subject to sale. Again, he wishes the legatee to get his watch, and it would have been quite unnecessary to express such a wish if he had constituted her residuary legatee. I cannot hold the words sufficient to

(1) 15 Ves. 500, 507.

pass the residue. The next of kin must be cited. If they do not appear, Miss O'Loughlin will be entitled to take administration as legatee.

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IN THE GOOD OF O'LOUGHLIN.

Attorney: *F. S. Gosling.*

MORDAUNT *v.* MORDAUNT, COLE, AND JOHNSTONE.

Feb. 25.

Lunacy—Evidence—Suit for Dissolution—Incapacity of Respondent to Plead—Issue as to Lunacy raised by Guardian appointed by Court—Practice.

A petition having been presented for dissolution of marriage by reason of the adultery of the respondent, and an allegation having been made and supported by affidavits that she was insane and incapable of pleading, a guardian was appointed by the Court for the purpose of raising that question on her behalf, and the issue was tried before the Court and a special jury.

THIS was a petition by Sir Charles Mordaunt, of Walton Hall, Warwickshire, for a dissolution of his marriage with the respondent, on the ground of adultery. The petition was personally served upon Lady Mordaunt, together with a citation, at Walton Hall, on the 30th of April, 1869. An application was afterwards made on her behalf to stay the proceedings, on the ground that she was not of sound mind, and was, therefore, unable to plead and to give instructions for her defence. Affidavits and counter-affidavits were filed as to the respondent's sanity, and on the 27th of July, 1869, an order was made by the Judge Ordinary that Sir Thomas Moncrieffe should appear as her guardian, ad litem, for the purpose of raising the question as to her state of mind. On the 30th of July, 1869, he entered an appearance in obedience to this order, and pleaded that, at the time when the citation in this suit was served on the respondent, to wit, on the 30th of April, 1869, the respondent was not of sound mind, and that she has not since been, and is not now, of sound mind.

The petitioner having taken issue upon this plea, the question was ordered to be tried before the Court and a special jury.

Feb. 16, 17, 18, 19, 23, 24. *Ballantine, Serjt., Dr. Spinks, Q.C.,* and *Inderwick,* appeared for the petitioner, Sir Charles Mordaunt.

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Dr. Deane, Q.C., Archibald, and *Searle,* for Sir T. Moncrieffe, as guardian for Lady Mordaunt.

Lord, and *Jeune,* watched the case for the co-respondents.

Ballantine, Serjt., in opening the case for the petitioner, stated that he proposed to prove certain statements which had been made by Lady Mordaunt, as also the truth of such statements, and from the proved truth of such statements, he would infer her perfect sanity at the time she made them.

Dr. Deane objected to such matters being introduced into the case. To do so would be extremely unjust to the co-respondents, who were not before the Court, and could only create a prejudice against the respondent. It was asking the Court to try inferentially the main question in the suit.

THE JUDGE ORDINARY. The only legal question is, are these matters material? It is difficult at any time to say at the outset of the case what may turn out to be material. It is alleged that the conduct of Lady Mordaunt since the 30th of April has been voluntarily assumed, and it is proposed to shew that, at the time of her confinement, she made certain statements which are said to have been reasonable in themselves, and, in point of fact, true, and which were derogatory to, or perhaps destructive of, her character as a married woman. Now, it would be trying the case in the dark if I were to determine, "You shall not tell the jury what Lady Mordaunt said, and what occurred at the time of her confinement. They shall judge whether she is sane or insane without knowing the motives which may have induced her to assume a certain conduct. and shall consider it as an abstract question wholly dissociated from the facts, which are relied upon by the petitioner as proving that the insanity is only feigned." In common fairness and justice, I cannot refuse to allow these matters to be gone into.

Feb. 25. THE JUDGE ORDINARY, in summing up, made the following observations:—

We now approach what is the real question in this case—the sanity or insanity of this lady at certain times. There is no subject upon which it is more difficult to find apt words to express the

idea with which the mind is filled than insanity. We speak of a person as being mad, of disordered intellect, imbecile, unsound, of weak intellect, and so on. Sometimes we speak of a person as a maniac, which term almost suggests some one chained by the leg. In truth, there is as great a variety of mental as there is of bodily disorders; and it is difficult to define with precision the exact mental disease which incapacitates an individual for the business of life. The only way I can put the case is this:—Do you think this lady was in such a condition of mental disorder as to be unfit or unable to answer the petition, or duly instruct an attorney for her defence? I prefer this form of question to that of whether she was mad, insane, out of her mind, and so forth, because it is the practical question we have to solve.

Now, two periods have been brought under our attention, namely, from the date of the confinement until the 30th of April, 1869, and from this last date to the present time. No doubt your decision must be confined to the second period; but it is impossible that you can be asked to come to a reasonable conclusion of her state during that time without knowing something of her condition in the first period. You may be satisfied, on reviewing the evidence as to the second period, that she was not then in a sound state of mind and reason from that to her condition during the first; or, conversely, you may form an opinion as to her condition during the first period, and reason from that to the second. But, whichever way you set to work, it will hardly be satisfactory to your minds unless you can bring both periods into some sort of harmony and reconcile the appearances the respondent presented in each.

Now, two tests have been resorted to by the petitioner in order to try the state of mind of the respondent in these periods. The first is, were her confessions true; because, if true, there is an end to the question, or, at least, that fact will go a long way to prove her sanity. That is the way it is put. Secondly, what reasonable things did she say or do during these periods? If we can prove a number of ordinary reasonable acts, we may fairly ask the jury to infer from them that the respondent was in the same state of mind as other people. Now, I am not quite sure that either test is correct. Suppose it to be true that Lady Mordaunt had dishonoured her husband as widely as she confessed, is it quite certain

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that she was in a sound state of mind when she made the confession of it? Do people, whose minds are disordered, never refer to things that have actually occurred? Is a woman, at the time of her confinement, when the mind and the whole system are probably more shaken and tried than in any other crisis of life, unlikely to refer to things that have really occurred? Is it not probable that a woman conscious of guilt, and more oppressed thereby at the moment of her confinement, when the offspring of her guilt is about to be born—even although her reason at the time be off its balance—should, nevertheless, give utterance to some facts that are perfectly true? On the other hand, is it altogether beyond the range of our own experience that, in certain conditions of a disordered mind, a person may state what is true, and add to it what is false? Would it not be possible for a guilty woman, at the moment of her confinement, to confess her guilt, and at the same time, worked upon by the consciousness of it, and with her imagination excited, and her mind disordered, to add to it a number of incidents which are not true? It does not seem to me to follow that because she said what was true, her mind was not disordered. We must ask ourselves, to begin with, why she made such a damning confession—a confession that would ruin her character for life.

And here we must step cautiously. It was suggested that she made the confession because she knew that the child was diseased, and being sure that her misconduct would be found out, thought it best to make a clean breast of the matter. If that could be established, it would exhibit her as a person acting in a reasonable way on a reasonable motive, and would go very far to shew that she had not a disordered mind. But the dates and facts are adverse to the suggestion. If she had waited until she had ascertained that the child was diseased, and had in her own mind connected it with her own misconduct, and then had made the confession, we should have had a chain of reasoning; but, in fact, she made the confession before the disease appeared, and at a time when she was told there was none, so that the explanation suggested is not sufficient. We want to know what impelled her to the confession; was she acting as a reasonable woman, or as one whose faculties were more or less disordered? If she was acting in full possession of her faculties, why should she make a confession? The obvious

answer is that, like many women in her position, she might think that by so doing she would obtain her husband's forgiveness.

But the peculiarity in this case is that, so far from apparently attempting to gain his forgiveness, she told the nurse "she would humble herself to no man;" and, when asked whether she would tell her husband she was sorry, she answered "she was not sorry." Was this the conduct of a reasonable woman? Can we refer her confession to any of the ordinary motives that actuate mankind? Throughout the case it has been far too easily assumed that the mere fact of some of her statements being true, would shew that her mind was not disordered.

I pass on to the other test. She did things which were reasonable, and talked at times like a reasonable being. Is that a test of sanity? Is it not of ordinary experience, that a person's mind may be disordered and yet he may constantly speak very reasonably upon many topics, and certainly answer common questions with facility? There are, of course, maniacs who sit mumbling in a corner, neither answering a question nor performing a reasonable act; but, to say nothing of cases of monomania, in which persons will converse rationally for hours together until the subject, on which they are mad, is touched upon, there are within the range of mental disorders, other persons, who, although lunatics, say and do perfectly sane things.

The proper test, therefore, is not so much what reasonable as what unreasonable things a person does, for it is the doing something at variance with what people in their sound senses do, which betrays insanity. . . . The question then is whether, blending the two periods together, you can come affirmatively to the conclusion that on the 30th of April, and for some time afterwards, Lady Mordaunt was unable to plead to the petition and to instruct her attorney. The notion that she was absolutely imbecile and bereft of reason is inconsistent with all the evidence in the cause. That she was partially bereft of reason at first, and that the symptoms of unsoundness afterwards became aggravated, is consistent with the evidence produced on her behalf. [The judge then proceeded to state the evidence in this case, and continued thus]:—

Such, then, is the evidence upon which the matter at issue rests. I have endeavoured to lay it before you in detail, and it is now

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your duty to weigh it and give it value as a whole. There are some broad views of the controversy which will hardly escape you. Starting from the admitted fact that this lady is now, and has been for some time, bereft of reason and intelligence, you will ask yourselves whether there are any facts proved which will enable you to draw a line in her history, and say when she became so. Was there any event, were there any signs or appearances that enable you with satisfaction to say, up to this time she was in full possession of her faculties, but from this time her mental faculties failed her? Was there any period upon which you can fix when new symptoms made their appearance? Was there, after her confinement, any event from which you can date a marked alteration in her conduct or demeanour? The difficulty in the way of those who assert that although incapable now, she was in possession of ordinary intelligence on the 30th of April, is the absence of all evidence which enables us to refer her present condition to any new occurrence after her confinement, or to connect it with the appearance at any specified time of new symptoms. The symptoms now are extreme taciturnity and apparent vacuity; she is silent, and does not appear to understand what is said to her. But this silence and apparent want of comprehension is precisely the condition she has been in all along. The present symptoms are but an exaggeration of those which appeared after her confinement. And if, in their fulness, they now establish mania, who shall say that in their inception, and when traversed by gleams of intelligence and understanding, they were not the signs of disease begun?

Another view of this matter will not escape you. Those who deny the disorder of the respondent's mind have not been able to controvert by evidence the acts, demeanour, and conduct, upon which the physicians on the other side have founded their opinion that her mind is unsound. Nor have they been able to gainsay the correctness of that opinion. They were, therefore, driven to the supposition that the lady had simulated insanity and has put on a false demeanour to lead us to a false conclusion. But does not the admission, made on behalf of the petitioner, that the respondent is now actually out of her mind, strike a fatal blow at this conclusion? Can we be asked, in reason, to believe that the lady began by pretending to be mad, and ended in being really so?

Nay, more, that she began by purposely assuming the bearing and demeanour of taciturnity and vacuity, and that, afterwards, when insanity really made its appearance, and she was no longer mistress of her own will, these selfsame symptoms characterized her condition, and formed the evidence upon which even the petitioner is constrained to admit that her mind is gone.

The jury found, that on the 30th of April, 1869, Lady Mordaunt was in such a state of mental disorder as to be totally unfit and unable to answer the petition and to duly instruct her attorney for her defence, and that she has been ever since, and still is, unfit.

Attorney for petitioner: *B. Hunt.*
Attorneys for respondent: *Benbow & Saltwell.*

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June 2.

Lunacy—Suit for Dissolution—Respondent Insane—Stay of Proceedings—Practice.

A petition was presented by a husband for a dissolution of his marriage by reason of the adultery of his wife. On an allegation that the respondent was insane, an issue was directed to try that question, and the jury found that on the day of the service of the citation the respondent was in such a condition of mental disorder as to be unfit and unable to answer the petition and to duly instruct her attorney for her defence, and that she had ever since remained and then still did remain so unfit and unable. Thereupon, the Judge Ordinary ordered that no further proceedings should be taken in the suit until the respondent recovered her mental capacity:—

Held, on appeal, by the majority of the Court, that such order was right.

SIR CHARLES MORDAUNT having petitioned this Court for a dissolution of his marriage by reason of the adultery of his wife with the co-respondents, a summons was taken out on the 7th of May, 1869, calling upon the petitioner to shew cause why time should not be given to answer on the ground that the respondent was not of sound mind, and therefore unable to answer and give instructions for her defence. Affidavits were filed on behalf of the petitioner and respondent respectively, and on the 27th of July, 1869, the Judge Ordinary directed that Sir Thomas Mon-

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crieffe, the father of the respondent, should appear as her guardian ad litem, for the purpose only of raising the question of her insanity. Sir Thomas Moncrieffe accordingly appeared, and pleaded that on the 30th of April, 1869 (the day on which the citation was personally served upon her), the respondent was not of sound mind, and that she has not since been, and is not now, of sound mind. Issue having been taken on this allegation, the question of insanity was, in February last, tried before the Judge Ordinary and a special jury, who found that on the 30th of April, 1869, Lady Mordaunt was in such a state of mental disorder as to be totally unfit and unable to answer the petition, and to duly instruct her attorney for her defence, and that she has been ever since, and still is, unfit. (1)

On the 8th of March, 1870, the adjourned summons came on before the Judge Ordinary in chambers, and application was made for an order on the summons staying proceedings. It was arranged that a formal order should be taken, without argument, in order that an appeal might be presented to the full Court.

THE JUDGE ORDINARY. This is an application to the discretion of the Court in giving further time to the respondent to put in her answer. The application was originally made in the month of May in last year. It was supported, according to the usual practice, by affidavits. These affidavits Sir Charles Mordaunt's advisers required time to answer. The summons was adjourned from time to time to give opportunity for full inquiry as to Lady Mordaunt's true state of health, and at length, in the month of July, several medical men on both sides having made their investigation and formed their opinion, the affidavits on the one side and on the other were completed. Upon these affidavits the matter came before me for a decision of the question whether any and, if any, what further time should be allowed to Lady Mordaunt to put in her answer. I found it impossible to reconcile the contradictions which the affidavits disclosed, or to form any satisfactory conclusion whether Lady Mordaunt was really in a disordered state of mind or not; and whether, if she was so, then she was likely or not to remain so. None of the deponents had been sub-

(1) See ante, p. 109.

mitted to cross-examination, and many questions required to be put and answered before anything like a reasonable conclusion could be formed. In this state of things the Court having power under the Divorce Act, at any stage of the proceedings, to direct the truth of any matter of fact to be determined by a jury, the parties on both sides agreed that the question between them should be so tried. It has been so tried, and the result is that the Court must now assume as a fact that Lady Mordaunt from the time the petition was served down to the present time has been in a state of mental incapacity to answer it. It is now contended, on the one side, that this circumstance forms no reason for further delaying Sir Charles's suit; and, on the other, that it forms a permanent bar to it. With the exception of the case of *Bawden* v. *Bawden* (1), in which Sir C. Cresswell permanently stopped a suit by a husband against an insane wife on the ground of her insanity, these questions are, I believe, entirely new. I think, therefore, the counsel have done right in determining not to argue them in chambers or even in court before a single judge, but to reserve the argument for the full Court. It is for the purpose of formally founding this appeal to the full Court that they ask an order from me to-day. For this purpose it signifies little, perhaps, what the order is which I make; but there is a consideration which has been constantly present to my mind throughout these proceedings, and which has not been hitherto brought into view. It is the possibility that Lady Mordaunt may recover her faculties—say within a year, although this is, I fear, less likely now than it was in July last, when the question of her mental condition first arose. If the testimony of the medical men at the trial is to be relied upon, persons suffering from puerperal insanity for the most part recover within a year, some within eighteen months or two years, and some never. It was, therefore, extremely probable at the outset that the lady, if deranged, would before long cease to be so; and there is some not unreasonable hope of her recovery still. Now, whatever be the case in reference to permanent insanity, whether it ought to bar the suit or not, it may, I think, with some force be argued that until all well-founded expectation or fair hope of the respondent's being able to answer the petition be

(1) 2 Sw. & Tr. 417; 31 L. J. (P. M. & A.) 94.

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dispelled, the petitioner ought, for a reasonable time at least, to be forbidden to proceed without that answer. The hardship inflicted on a woman who has been temporarily deranged, and who on returning to her senses should find herself to have been divorced without defence, is incomparably greater than any injury resulting from the delay in getting quit of an alleged adulterous wife which her mental derangement may have enforced upon the husband. The possible cessation of the mental malady materially affects the main question looked at on either side. For if it be assumed as a general proposition that the insanity of the respondent ought not to be a bar to the petitioner's remedy, it would seem still reasonable that his suit should not be pressed during her temporary derangement. On the other hand, if it be declared that a divorce involving the status of the respondent ought not to be decreed during that respondent's insanity, it is reasonable that the petition should not be wholly dismissed, but only stayed until the respondent should (if ever) recover. In either view of the case it would seem that some delay must be granted, if the insanity is proved, unless, indeed, it is at the same time proved that, so far as medical experience goes, it is incurable and permanent. The order, then, which I propose to make, is this:—"That no further proceeding be taken in this suit until Lady Mordaunt recovers her mental capacity, the petitioner to apply to the Court whenever he is able to affirm her recovery." In making this order I do not desire to express any opinion until the case has been argued as to the effect which permanent insanity of the respondent might have in permanently staying the petitioner's suit. So far as this order involves that question, I must be taken not as expressing any opinion of my own, but only as following (according to the usual practice) the decided case of *Bawden* v. *Bawden* (1), leaving the propriety of that decision to be settled by the Court of Appeal. My desire is to make such an order to-day as shall bring all the legal questions which arise upon Lady Mordaunt's mental condition, such as it has now, after a long and painful inquiry, been finally ascertained to be, before the full Court for its ultimate decision.

The order was drawn up as follows:—"Upon hearing counsel

(1) 2 Sw. & Tr. 417; 31 L. J. (P. M. & A.) 94.

for the petitioner and for Sir Thomas Moncrieffe, the guardian ad litem of the respondent, I do order that no further proceedings be taken in this suit until Lady Mordaunt recovers her mental capacity, and that the petitioner be at liberty to apply to the Court whenever he is able to affirm the respondent's recovery." From this order the petitioner appealed to the full Court on the following grounds: First, because the respondent's insanity at the time of the service of the citation is not a bar to his further prosecution of his suit for a divorce. Secondly, because the respondent's insanity, though of a permanent character, is not a bar to his further prosecution of his suit for a divorce. Thirdly, because it does not appear from the evidence given at the trial of the issue, or otherwise, that there is any prospect of the respondent recovering within a reasonable time. The guardian ad litem gave as a reason for affirming the order of the Judge Ordinary, that as long as the respondent remains in such a condition of mental disorder as to be unable to answer the petition and to instruct her attorney for her defence, such mental incapacity constitutes a bar to the further prosecution of the suit by the petitioner.

The appeal came on for hearing before Kelly, C.B, the Judge Ordinary, and Keating, J.

April 27, 28. *Ballantine, Serjt.*, for the petitioner. Assuming the insanity of a person charged with adultery at the time he or she is called upon to plead in a suit for divorce, the question is whether such insanity is a legal bar to the continuance of the suit. There are only two cases in which in this country the point has been raised, namely, *Bawden* v. *Bawden* (1), and an earlier case (*King* v. *King*), referred to therein.

[THE JUDGE ORDINARY. Dr. Bayford has communicated to me the substance of that earlier case. Adultery was alleged to have occurred in 1839, 1840, and 1841, and an action for crim. con. was brought, in which 100*l.* was recovered. It was alleged on behalf of the wife that incipient insanity shewed itself in her in 1837, which became confirmed in 1841, and latterly she was confined in a lunatic asylum. Sir H. Jenner Fust directed the case to stand

Post 125, 132.

(1) 2 Sw. & Tr. 417; 31 L. J. (P. M. & A.) 94.

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over, in order that he might consider what power he had to make a decree against a lunatic. It only shews, therefore, that the Court entertained a doubt as to its power.]

In an American case (*Mansfield* v. *Mansfield*) (1), after the Court had heard evidence, its attention was called to the fact that the respondent, the husband, was insane; it therein suspended the proceedings and informed the petitioner, that if so advised, she might procure the appointment of a guardian to her husband, upon whose appearance the proceedings would be continued. The American law, therefore, permits proceedings for a divorce, notwithstanding the insanity of the respondent.

[THE JUDGE ORDINARY: Does the marriage law of Massachusetts allow of recrimination? The difficulty in proceeding against the lunatic respondent in this country lies in that direction.]

In England, a lunatic may bring a suit for divorce: *Parnell* v. *Parnell* (2); why may not then a respondent, although a lunatic, put in an answer by his or her guardian? No injustice would be done if the Court had a discretion to stay proceedings for a limited time. That is the course which would be taken in the case of the absence or insanity of a material witness. My argument is, that although the Court may postpone a case in furtherance of justice for a time, it cannot do so for a permanence, by reason that the respondent is a lunatic. Marriage is a civil contract and lunacy is no bar in suits on civil contract. In *Owen* v. *Davies* (3), Lord Hardwicke directed the specific performance of a contract entered into by the defendant, although he had afterwards become a lunatic. So also, a lunatic may be made a bankrupt (4), and have his legal status destroyed, without an opportunity of defending himself. No doubt, in criminal cases, the proceedings must be stayed, because a lunatic cannot plead, but it should be remembered that, whilst in civil cases a party is necessarily injured by a stay of proceedings, it is not so in a criminal suit, for neither the public nor the prosecutor are injured by the accused being locked up as a lunatic, instead of being sentenced: 1 Hale, P. C. 32. It may be urged that the respondent would be damnified if the case were allowed to proceed, because she would be deprived of her right to recri-

(1) 13 Mass. Rep. 412.
(2) 2 Hagg. Const. 169.
(3) 1 Ves. Sen. 82.
(4) *Anonymous Case*, 13 Ves. 590.

minate, but the injury to the husband if the suit be stayed will be much more serious.

[THE JUDGE ORDINARY. There is one difficult point I should wish to hear argued. The power of obtaining a divorce is subject to certain conditions, the enforcement of which is a matter of interest to the public. In consequence, the legislature has empowered the Queen's Proctor to bring evidence before the Court if any of these conditions have been violated. At present, the parties to the suit are able to give evidence, and there are many matters which can be alleged against a petitioner which are within the cognizance of the respondent only. Is it not necessary therefore, that she should be able to give instructions for her defence ?]

In a criminal suit also, a hardship might arise under the present state of the law to a person charged with a crime whose innocence could be proved by no one but his wife. Indeed, the respondent's evidence, when standing alone, would rarely be accepted; in most cases, however, corroborative evidence is forthcoming. Possibly, if facts were brought to the notice of the Court which, although not sufficient to prove cruelty or desertion, shewed a probability of either of them, the Court would delay its decision until better informed. There is no power by law to stop the proceedings, although the discretionary power of the Court may be so used as practically to accomplish that object.

Dr. Spinks, Q.C., on the same side. As regards the respondent's competency to give evidence, that is a mere accident in this case, for it is in consequence of the delay occasioned by the intervention of Sir Thomas Moncrieffe, that the case was not disposed of before the passing of the statute 32 & 33 Vict. c. 68. Proceedings are not stopped, where the defendant is a lunatic either in trespass or bankruptcy, and the Court of Chancery has repeatedly dissolved partnerships, although one of the parties is a lunatic. The guardian of a lunatic could have instituted a suit for divorce à mensâ et thoro, by reason of adultery, in the Ecclesiastical Court: *Parnell* v. *Parnell* (1); and for nullity of marriage, *Countess of Portsmouth* v. *Earl of Portsmouth* (2); *Turner* v. *Myers* (3); *Wilkinson* v.

(1) 2 Hagg. Const. 169. (2) 1 Hagg. Eccl. 355.
(3) 1 Hagg. Const. 414.

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Wilkinson (1); *Hancock* v. *Peaty* (2); and if a lunatic petitioner could appear by his guardian, why not a lunatic respondent? In *Beauraine* v. *Beauraine* (3), Lord Stowell ordered the father to appear as guardian ad litem for his son, a minor, who was charged by his wife with cruelty and adultery. It is true that in that case the Court of Chancery held that a judge of an ecclesiastical court had no power to compel a father to act as guardian for his son, but this Court can have no difficulty in finding some person willing to accept the office of guardian, or it may dispense with the service of the citation altogether. In a case decided last year, the wife proceeded against her husband for cruelty and adultery; the latter recriminated, and prayed also for a dissolution of marriage. The jury found a verdict in favour of the respondent, and the Court pronounced a decree in accordance with his prayer. Would that prayer have been refused if the petitioner had been insane? In the case of *Talbot* v. *Talbot* before the House of Lords in 1856, the respondent had been insane between the date of the adultery and the trial, but no suggestion was made that a state of fatuity and idiotcy would be a bar to the proceedings. A divorce is subjected to certain conditions, all of which relate to the conduct of the petitioner, and if he has not violated any of them, he ought not to be deprived of his remedy.

Inderwick, on the same side.

Dr. Deane, Q.C., for the respondent's guardian. Marriage is not a mere contract; it confers a status which, in the case of the respondent, may be changed whilst she is insane if the proceedings are continued. In actions for debt or damages only pecuniary or personal interests are concerned. The cases of *Bawden* v. *Bawden* (4), and *King* v. *King* (5), are in point, and in the respondent's favour. The case of *Mansfield* v. *Mansfield* (6) is no authority, because in other States of America there have been decisions the other way (7). As regards the case of *Beauraine* v. *Beauraine* (3), there is no analogy between the position of a minor and that of a lunatic. A

(1) 4 N. of C. 295.
(2) Law Rep. 1 P. & M. 335.
(3) 1 Hagg. Const. 498.
(4) 2 Sw. Tr. 417; 31 L. J. (P. M. & A.) 94.
(5) Not reported. See ante, p. 113.
(6) 13 Mass. Rep. 412.
(7) *Broadstreet* v. *Broadstreet*, 7 Mass. Rep. 474; *Wray* v. *Wray*, 19 Alabama Rep. 522.

minor may do acts, which will be grounds for a divorce, which a lunatic cannot do. The decisions as to suits for nullity are not in point, for there is an obvious distinction between an inquiry whether a contract has or has not been entered into, and an inquiry whether the contract has or has not been broken. In one case the question is whether a marriage ever existed, in the other, whether a marriage is to be dissolved.

[KEATING, J., asked whether there were any cases in which it had been held that insanity at the time of the adultery charged was a good ground of defence?]

Dr. Spinks referred to the case of *Hall* v. *Hall* (1), in which a probability arose on the evidence that the respondent was insane, and the Judge Ordinary ordered the case to be adjourned for further evidence on that point. It was suggested he might have been insane at the time the cruelty charged was alleged to have taken place.

[KELLY, C.B. That was a suit in which the husband and wife were alone concerned. Here there are co-respondents, and if the suit is stopped there is no remedy against them.]

Dr. Deane. The case of *Parnell* v. *Parnell* (2), relied on by the other side was one for judicial separation, and one reason given by Lord Stowell for allowing it to proceed was, that the wife could sustain no injury, as the lunatic would have a power of condonation if he recovered, or he might stand on what had been done for him. A suit for divorce, although a proceeding civil in its nature, is in its effects criminal: Bishop on Marriage, s. 299; Fergusson on Marriage and Divorce, ss. 397, 398, 399; Story's Conflict of Laws, s. 109; for it changes the status of the parties. The hardship to which the petitioner may be exposed by a stay of proceedings will not be so great as that to which an innocent wife may be subjected through inability to give instructions for her defence. The statute 20 & 21 Vict. c. 85, contemplates only persons of legal capacity, for it provides for such defences as a sane person only could give information or instruction about. Material facts as regards recrimination, for instance, might be known to the respondent only; and, unless she is capable of communicating them to third persons, how can they be brought to the knowledge of the Court? The

(1) 3 Sw. & Tr. 347; 33 L. J. (P. M. & A.) 65. (2) 2. Hagg. Const. 109.

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legislature, in giving these grounds of defence to a respondent, must have intended that she should be in a proper state to make use of them.

Archibald, on the same side. It is contrary to justice to make a decree affecting personal status unless the party interested is really or constructively before the Court, but in this case the respondent has not received notice of the proceedings, for she is unable to comprehend the process served upon her, and no substituted service has been asked for: *Buchanan* v. *Rucker* (1); *Duchess of Kingston's Case* (2); *Reynolds* v. *Fenton* (3); *Beverley's Case* (4); Fitzherbert, N.B. 202; *Molton* v. *Camroux* (5); Bacon, Ab. tit. Idiots and Lunatics; *Needler* v. *The Bishop of Winchester* (6); *Baxter* v. *Lord Portsmouth* (7); 1 Hale, P. C. 30, 34; Remarks on the Trial of Bateman, by Sir John Hawles. (8) In the case of *Woodgate* v. *Taylor* (9) the committee of a lunatic, by order of the Lords Justices, took proceedings to obtain a judicial separation by reason of the adultery of the lunatic's wife, but the difficulty which would attend the setting up the defences mentioned in the statute against an application for dissolution of marriages could not arise there. The committee of a lunatic ought not to have the power to present a petition for dissolution of marriage, because a lunatic petitioner, like a lunatic respondent, cannot bring forward matters within his personal knowledge only, nor explain recriminatory charges.

[THE JUDGE ORDINARY. In a case that was before me under the Legitimacy Declaration Act,—*In re Chaplin* (10),—an application was made for the appointment of a guardian ad litem to an infant, in order that proceedings might be instituted to ascertain the infant's legitimacy. As a decision in such a case might be very prejudicial to the infant, I directed the registrar to inquire whether it would be for the benefit of the infant that the suit should proceed, and on his report I refused to sanction the appointment of a guardian. In *Woodgate* v. *Taylor* also, before the Lords Justices

(1) 1 Camp. 63.
(2) 2 Sm. L. C. 5th ed. 642.
(3) 3 C. B. 187.
(4) 4 Coke Rep. 123, b.
(5) 2 Ex. 487; 4 Ex. 17.
(6) Hob. 224 (n).
(7) 5 B. & C. 170.
(8) 11 State Trials, at p. 476.
(9) 2 Sw. & Tr. 512; 30 L. J. (P. M. & A.) 197.
(10) Law Rep. 1 P. & M. 328.

authorized the institution of the suit, a reference was made to the master. The same might be done in a suit for dissolution of marriage.]

The case of *Woodgate* v. *Taylor* (1) only proves that in applications for judicial separation the Divorce Act did not alter the practice of the ecclesiastical courts. In suits for dissolution of marriage, however, special defences are permitted, and the respondent should have the opportunity of setting them up.

Searle, on the same side.

June 2. KEATING, J. This is an appeal against an order made by the Judge Ordinary on the 8th of March, 1870, directing that no further proceeding be taken in this suit until Lady Mordaunt recovers her mental capacity, and that the petitioner be at liberty to apply to the Court whenever he is able to affirm the respondent's recovery. It appears that the petitioner, Sir Charles Mordaunt, filed his petition in this court for a divorce on the ground of the alleged adultery of the respondent with the co-respondents, and that on the 30th of April, 1869, the petition and citation were served upon the respondent. Citations were also served upon the co-respondents, who appeared and filed their answers denying the alleged adultery. An application was afterwards, on the 9th of May, 1869, made on behalf of the respondent, to stay the proceedings on the ground of her mental incapacity, and to extend the time for entering an appearance, and filing an answer on her behalf. The Judge Ordinary, therefore, upon affidavits, ordered that the respondent's father should appear as guardian ad litem, and allege the insanity. The guardian accordingly appeared and pleaded the insanity of the respondent formally. The petitioner took issue on the plea, and that issue was tried before a special jury, who found that the respondent was, at the date of the service of the citation, in a state of mental derangement, which rendered her wholly unfit and unable to answer the petition or duly instruct an attorney for her defence, and that she had ever since remained, and then still remained, so unfit and unable. The Judge Ordinary afterwards, and upon the understanding of both parties, that the question should be submitted to the full Court, made the

(1) 2 Sw. & Ir. 512; 30 L. J. (P. & M.) 197.

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order appealed from; and the question is whether that order should be rescinded or varied, or in other words, whether proceedings upon a charge of adultery, with a view to a divorce, can or ought to be continued against a respondent, who, at the commencement of the suit, was, and still is, wholly unable and unfit through mental incapacity to defend herself so long as that mental incapacity continues, and I am of opinion the order made ought not to be rescinded or varied.

If this were a criminal proceeding, or a proceeding in pœnam properly so called, of course there could be no doubt upon the subject. Mental incapacity not only excuses the commission of what otherwise would be crime, but is a bar at every stage to any proceeding on the part of the Crown in respect of it. It excuses the act charged as crime, because the essence of crime is the mens rea, which could not exist in such a case, and it is a bar to criminal proceedings in consequence of the want of capacity on the part of the accused to understand the charge or make a defence to it. The rule and reason for it are well stated in Broom & Hadley's Commentaries on the Laws of England, vol. iv. p. 22, citing Hale P. C. 34.

It is true that by the law of England adultery is not the subject of indictment (1): *Galizard* v. *Rigaud* (2), and therefore cannot with strict technical accuracy be termed a crime, yet the charge, both in its nature and consequences, much resembles a criminal charge. Indeed, Mr. Emlyn (whose learning and ability are vouched by Mr. Hargrave) in his preface to the second edition of the State Trials, page xxxiii., note (h), expresses an opinion that it was indictable by our law, and cites authorities for his opinion. By the law of France it is punishable as a criminal offence, and we have the authority of Lord Holt in the case referred to (*Galizard* v. *Rigaud*), that it was considered as such in the spiritual courts. In divorce proceedings in the House of Lords also, it appears to have been so treated in the *Duchess of Norfolk's Case* (3), the entry being: "Upon reading the charge which Henry, Duke of Norfolk, hath exhibited against his wife Mary, Duchess of Norfolk, for the *crime* of adultery, it is ordered, &c." No case is to be found in the ecclesiastical courts where the question has arisen, how far adultery

(1) Co. 2 Inst. 488. (2) Holt's Rep. 597; 2 Salk. 552.
(3) 12 State Trials, 890.

to justify a divorce can be committed in the absence of the mens rea; but it seems clear that by the French law, it is essential to the commission of the crime: Gilbert Codes annotés par Sirey Code Penal, p. 336, and Merlin, 1 Rep. Adultére, n. 10. Whilst in America the decisions conflict on the point: 2 Kent's Comm. p. 82, 10th ed. s. 106, n.

How that question will be dealt with should it arise in the courts of this country, it is not necessary to anticipate, for, at all events, the nature of the offence charged seems to me to distinguish the proceedings in divorce essentially from those merely of a civil character, in which the object is the recovery of debt or damages for injury to person or property: Bacon's Abr. tit. Trespass (G.); but where the personal status of the defendant is wholly unaffected. In proceedings for a divorce, although the consequences to the party charged and found guilty, are certainly not the same as in a misdeamour, yet in the case of a wife respondent, they are so incalculably more terrible than fine and imprisonment, that (as argued by Mr. Archibald) it seems contrary to all sense of natural justice that a woman should be convicted of adultery involving a change in her personal status, and that by a judgment in rem without the fullest opportunity of making her defence. By analogy, therefore, to those principles which have been established in the administration of criminal justice in this country, it seems to me that the proceeding for a divorce for cause of adultery, although not strictly a criminal proceeding, is at least a proceeding quasi in pœnam, and ought to afford a similar protection to the respondent in the present case.

But by far the most cogent reasons for supporting the present order are, in my opinion, to be found in the provisions of the statute itself upon which the jurisdiction of this Court is founded, and in order to appreciate their effect, it is necessary to bear in mind that before the passing of the statute 20 & 21 Vict. c. 85, by the law of England, marriage, when lawfully contracted, was an indissoluble contract. Unlike all other civil contracts, it could neither be put an end to by mutual consent, nor by act or operation of law; the husband whose wife had proved unfaithful, might indeed go into the spiritual court, and, upon proof of adultery, without fault on his part, obtain a divorce à mensâ et thoro, and

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also bring an action for damages against the adulterer, but the marriage contract remained undissolved, nor could the parties during their joint lives marry again unless by special interference of the legislature.

In that state of things the statute 20 & 21 Vict. c. 85, was passed, which, for the first time, gave to a court of law the power to dissolve a lawful marriage, but only sub modo, and subject to certain conditions. The 27th section of that statute enables either husband or wife to present a petition for dissolution of marriage. The 28th section provides that the person charged with adultery with either party to the marriage may be made respondent, and that either party may have the facts tried by a jury. Section 29 enacts "that upon any such petition for a dissolution of marriage, it shall be the duty of the Court to satisfy itself so far as it reasonably can, not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to, or conniving at the adultery, or has condoned the same, and shall also inquire into any counter charge which may be made against the petitioner." By section 30: "In case the Court, on the evidence in relation to any such petition, shall not be satisfied that the alleged adultery has been committed, or shall find that the petitioner has been accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then in any of the said cases the Court shall dismiss the said petition." The 31st section provides, "that in case the Court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory to, or conniving at, the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the Court shall pronounce a decree declaring such marriage to be dissolved. Provided always that the Court shall not be bound to pronounce such decree, if it shall find that the petitioner has during the marriage been guilty of adultery, or if the petitioner shall in the opinion of the Court have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or

of having deserted, or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery;" and the 43rd section enables the Court to have the petitioner examined, and cross-examined on oath if necessary, in order to obtain information with reference to the various matters upon which it is to satisfy itself, saving only the right of the petitioner to refuse to answer any question tending to prove his or her adultery. Now it appears to me to be impossible to apply these provsions of the statute in the manner contemplated by the legislature in a case where one of the parties is insane. The Court cannot pronounce a decree of divorce unless satisfied after inquiry, which it is bound to make, that none of the statutable impediments exist. Yet the existence of those impediments, or of most of them, is peculiarly, and often exclusively, within the knowledge of the parties themselves. How, then, can it be supposed that the legislature contemplated such a suit proceeding during the insanity of one of the parties to it? Connivance, condonation, cruelty, desertion, wilful separation without reasonable excuse, wilful neglect or misconduct conducing to the adultery, are all matters upon which it is the duty of the Court to satisfy itself, as to some absolutely, as to others if charged; but how are they even to be suggested, much less proved, when one of the parties is insane? Take the case of a petitioner. Is a petition for a divorce to be presented or prosecuted on behalf of a lunatic with a view to alter his or her personal status without his or her consent? Who can say that such a proceeding, if it could be taken, would be necessarily for his or her benefit; or would be approved of upon recovery? A proceeding for a judicial separation stands upon a totally different ground. It is temporary in its effect, and always contemplates the possibility of a reunion, and there certainly is authority for such a decree being made on the petition of the committee of a lunatic: *Woodgate* v. *Taylor* (1), from which (note 1) (2), it appears that the distinction between judicial separation and divorce was present to the minds of the Lords Justices in making their order for proceeding in that case. It is also to be observed as to that case that the attention of the Court did not seem to

(1) 2 Sw. & Tr. 512; 30 L. J. (P. M. & A.) 197. (2) 30 L. J. (P. M. & A.) 197.

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have been called to the provisions of the 41st section of the statute.

But whatever may have been the case with reference to a petitioner, yet in the case of a respondent, although proceedings for judicial separation are not fenced round with all the statutable conditions applicable to cases of divorce, there is no instance to be found in which a decree for even a judicial separation has been made against a lunatic respondent, and there seems to be an additional objection to making such a decree, in the fact that by a recent statute, 32 & 33 Vict. c. 68, he or she is made a competent witness, and has the right to give evidence in disproof of the charge of adultery. It would seem, therefore, extremely unjust to deprive the parties charged of that right without any fault on their part. It is not difficult to suppose many cases, where suspicion of the gravest kind resulting from conversations, or letters, or entries, might be dispelled by a few words of explanation, which could only be given by the absent lunatic; or when a totally different complexion might be put upon facts apparently of a highly criminatory character, by the evidence of the party charged. I do not wish to attach undue importance to the fact, that charge or countercharge is either by statute or rule, to be made upon the oaths of the parties respectively, as perhaps the Court could in furtherance of justice relax the stringency of those requirements; but such a provision in the statute, in the case of a petitioner, tends at least to shew that the legislature contemplated the parties being in a state of sanity.

Neither does it seem to me that the argument urged at the bar, that, as the Court could pronounce a decree of divorce against a party not served with the citation, so it might in the case of a lunatic, avails much to the case of the appellant. When such a decree is made, the Court is satisfied either that the party has gone away to avoid service, or may have had notice by means of advertisement, or other notices directed to be given, whereas in the case of an insane person the Court knows that the party had not and could not have had notice, and cannot possibly defend himself or herself against the charge.

The authorities upon the point are necessarily few, but what there are clearly support the order under discussion. In a case

not reported, but furnished from the notes of the late Sir Herbert Jenner, Bart. (*King* v. *King* (1)), the question seems to have arisen whether a decree à mensâ et thoro could be made against a lunatic respondent, that learned judge expressing a doubt whether he could make such a decree, took time to consider; no judgment is known to have been given, nor is there any trace of such a decree having been made. However, the question arose afterwards, before the late Sir C. Cresswell, in the case of *Bawden* v. *Bawden* (2), on a petition for a divorce under the present Act, and that eminent judge, after taking time to consider, gave judgment that the proceedings should be stayed. Now this decision is admitted to be in point, and indeed the present appeal is with a view to overrule that case, although in form it is directed against the order of the Judge Ordinary made upon its authority. In my judgment, however, that case was rightly decided. I do not refer to the hardships suggested, quite as great on one side as on the other, for it was admitted that the case must be decided on other considerations. The order as made stays the proceedings until the petitioner, who has the custody of the respondent, can assert her recovery. Meanwhile, he is in the same position as he would have been in before the passing of the statute. The facts of this case are not before us, but should it, upon the facts, in consequence of any peculiar hardship, be deemed one fit for legislation, there is nothing to prevent it. In my opinion, the order of the Judge Ordinary was right, and the appeal against it ought to be dismissed.

THE JUDGE ORDINARY. The main question to which the insanity of the respondent gives rise is, whether the suit can be permitted to proceed to a decree against her, so long as she remains insane. A suggestion has been made that the order now under appeal should be altered by staying the proceedings for a time, until recovery shall be declared hopeless. An obvious objection to this course is, that the possibility of recovery is a matter more of speculation than of definite conclusion. But it seems to me that the propriety of adopting it depends upon the legal effect of the respondent's insanity, so long as the insanity continues. If, while

(1) See ante, p. 113. (2) 2 Sw. & Tr. 417; 31 L. J. (P. M. & A.) 94.

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the insanity continues, the petitioner is entitled nevertheless to proceed to prove his case, it would still be right in justice to the respondent to stay the proceedings for a reasonable time, to take the chance of her recovery, before the charge is pressed against her. If, on the other hand, the true view is, that no proof or decree can lawfully be made against her so long as she continues insane, there is no need, as it seems to me, for a stay of proceedings for any period short of her recovery, and no justification for the postponement of a decision on the main matter, which the parties have asked at our hands. The authority of this court to entertain a suit for the dissolution of marriage is derived wholly and solely from the statute by which this court was first instituted. The relief which the Court was then, for the first time, empowered to give in cases where the marriage vow had been violated, is defined and regulated by the various provisions of that statute, and restricted by the conditions thereby imposed. The language that has been held in argument invites and provokes some consideration of the true nature and intent of these various provisions. It has been argued that marriage is nothing but a contract, subject to all the legal incidents of an ordinary contract, and giving rise to the like legal remedies. From this position, if tenable, the conclusion would not be difficult, that insanity in her who has broken the contract should be no bar to the remedy of him who complains of the breach of it. For, the courts of law and equity have always, although in different ways, enforced remedies arising out of contract, notwithstanding the insanity of the defendant.

But, is it true that marriage is an ordinary contract? Surely it is something more. I may be excused if I dwell somewhat on this matter, because I conceive it lies at the very root of the question in discussion. Marriage is an institution. It confers a status on the parties to it, and upon the children that issue from it. Though entered into by individuals, it has a public character. It is the basis upon which the framework of civilized society is built; and, as such, is subject in all countries to general laws which dictate and control its obligations and incidents, independently of the volition of those who enter upon it. Marriage, moreover, has features, which belong to no other contract whatever; and notably these two: it cannot be rescinded, even by the consent of

both parties to it, and it is commonly contracted under the sanction of a religious ceremony. This, the leading feature of marriage, its indissolubility, was preserved by the law of this country up to the time that the statute constituting this court passed into legislation. No matter how flagrantly the obligation of the contract had been violated on one side, there was no legal right capable of enforcement by any tribunal to a release from the corresponding obligations on the other. Cases of grievous hardship brought about a remedy by measures above and beyond the law, for those who could afford to pay for them. But the essence of the marriage contract remained the same, and the bargain to live together for better and for worse, continued to be one, from which there was no voluntary retreat or legal escape. To what extent, then, did the legislature intend, by the Divorce Act, to break in upon the integrity of this system? It is worth while to examine this matter, for the power conferred by the Act of resorting to this court has been treated in argument as if it were simply a new means of asserting a pre-existing legal right.

According to this view the act of adultery is treated as conferring at once the right to a dissolution, and the Divorce Court only as furnishing the necessary machinery. But is this so? It appears to me that the new remedies, like those of a more limited character accorded by the ecclesiastical courts, were granted, if I may use the expression, rather ex gratiâ, than ex debito justitiæ. The Divorce Act kept alive the restrictions under which the legislature, in the case of divorce bills, and the ecclesiastical courts, in the case of divorce à mensâ et thoro, had been used to act. And these restrictions plainly shew the spirit in which the relief was granted.

It was a principle of universal application in the spiritual courts, that a suitor who prayed for a relaxation of his marriage ties should come into court with clean hands. It was further necessary that he should not, even in a moment of excitement, have pardoned his wife, and taken her back to him. It was a further principle that he should be sincere in the grievance under which he professed to suffer. And lastly, he was bound to be prompt, and not open to the charge of unreasonable delay. In a like spirit a divorce bill, when passing through the House of Lords, was treated rather

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as a matter of general merits laying the foundation for a measure of grace than a mere investigation of delinquency drawing after it an absolute right to redress. The entire conduct of the husband was submitted to review; the complaints and excuses of the wife, however guilty, were entertained; and the bill, which passed into a law only if the case were in all respects meritorious, was liable to be defeated in its last stages if the husband failed to restore an adequate part of the fortune, if any, that his wife had brought him. No doubt the breadth of this discretion in granting relief was much narrowed, and its limits defined, when the dissolution of marriage was confided to the hands of a regular tribunal. Still, a large discretion was left. The Court, under s. 31, has the discretion to refuse a decree if the petitioner has been guilty of adultery, if he has been guilty of cruelty, if he has been fairly chargeable with unreasonable delay, if he has wilfully, and without reasonable excuse, separated himself from his wife, if he has deserted her, and lastly, if he has been guilty of any neglect or misconduct conducing to his wife's adultery. And here it is to be observed, that the maintenance of these restrictions and qualifications is treated by the legislature as a matter not merely of equity to the erring wife, but of public concern. The enactments which followed the Divorce Act made special provision to insure divorces not being granted when any of these imputations could be successfully made against the petitioner. It cast upon a public officer, the Queen's Proctor, the duty of intervening at any time, and bringing them to light, and even empowered individuals, whether interested in the matter, or entire strangers to the parties, to do the like.

It is only, therefore, if the petitioner is free from all reasonable complaint of misconduct himself, that the legislature intended to release him from bonds in their terms and their nature permanent. The statute accorded to those to whose own conduct no blame could be imputed a relief from obligations voluntarily undertaken and still binding, but which the unprovoked misconduct of others had rendered a grievous and intolerable burthen. But it did not, as it seems to me, intend to do more. It did not intend to affirm that the adultery of the wife at once conferred upon the husband an immediate, although defeasible, right to have his contract of marriage dissolved, treating his release from the contract as a simple

right growing out of the breach of it by the other party, and thus placing it on a level with the contract for a sale of goods or the hire of a shop. When the Court, therefore, is asked to deal with this question of insanity as the courts of law would deal with a case of ordinary contract, the answer is that marriage is not an ordinary contract. When the analogy of legal remedies in other cases of contract is put forward for adoption, the answer is that the analogy does not exist. If it did it would, no doubt, give a summary solution to all difficulties, but a rather startling one. A lunatic at common law is liable to be sued, and (until arrest was abolished) held to bail, just the same as a sane man. There is no need at common law for the appointment of a guardian, or the nomination of any one to act in the lunatic's place; the suit proceeds in all respects as if the defendant were sane.

If this Court, then, were to act on analogy with this system, the petitioner would have only to prove service of the petition on his lunatic wife, and he might, without warning to her family or her friends, proceed to establish her guilt without danger of defence or recrimination. For these reasons it appears to me that we must look elsewhere for the solution of the question at issue than to the analogy of ordinary remedies for the breach of ordinary contracts. And as it must be conceded that the true meaning of the legislature in the Divorce Act, if it can be arrived at, is that which ought alone to guide our decision, it is to the provisions of that Act that I again recur.

It is to be observed at the outset that there are no words specially applicable to the case of lunacy either of the petitioner or the respondent. If suits were intended to be entertained by and against such persons, it would be reasonable to look for some provisions by which their friends or relations might act for them and protect their interests. But there are none such, nor indeed any special provisions or machinery for the conduct of such suits. If the statute applies to lunatics at all, it deals with them in all respects like other persons. Accordingly the lunatic petitioner must present a petition, and accompany it by an affidavit sworn by himself as to the truth of its allegations. On this s. 41 is express. The lunatic respondent, too, must be served personally with the petition, unless the Court dispense with it. Then the

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lunatic respondent is invited to recriminate, and submit the petitioner's matrimonial conduct to investigation. If she does this, the rules of the court, as they stand at present, require that she should affirm the truth of her charges on personal affidavit. Any such charges the petitioner, whether a lunatic or not, has to meet; and the duty is, by s. 29, directly cast upon the Court of investigating all such counter charges.

Now, so far as the mere machinery indicated is concerned, its defects might, no doubt, be to some extent supplied by rules of court. It is not, therefore, so much that the means of entertaining such a suit as this are beyond reach, if it could only be made plain, that the legislature so intended, as that the absence of appropriate provisions for lunatics in those parts of the Act which concern procedure tends to shew that the Act was not designed for any but sane suitors. But I pass on to a more general view, and I ask myself the broad question, whether, looking at the substance rather than the form of these remedies, they were intended for lunatic petitioners and lunatic respondents. I say *lunatic petitioners* as well as respondents, for there is no distinction made in the Act; the words throughout are quite general, and there is no middle ground between the two opposite opinions, that these words include lunatics, or exclude them altogether. Take the case of the lunatic petitioner first. Did the legislature really intend that, while a man was out of his senses, either he or his friends should be at liberty to take legal proceedings to put away his wife? Surely such a matter as the divorce of his wife (perhaps the mother of his children) is one upon which he should be allowed himself to exercise some reasonable option. And while, from aberration of mind, he is incapable of exercising that option, was it really contemplated that he, or his friends on his behalf, should be permitted to bring to the scandal of a public trial his wife's alleged guilt and his own supposed dishonour? But another result might follow. His wife, though guilty herself, might recriminate, and charge him with conduct which his condition of mind would prevent him from answering with effect. His suit would then fail, the counter charge would be established against him, and his remedy be barred for ever, though he should recover his senses, and wish to pursue it.

Then take the case of the lunatic respondent. The gravest of

all charges, short of indictable crime, is made against her. She is unable to give any explanation to her advisers of the circumstances from which her guilt is argued. The charge is of a purely personal character, and the decree sought is aimed directly at her personal status. Her exculpation, if there be one, probably lies in facts and events known only to herself. All her letters and documents have probably passed into the hands of her husband, who may produce what he likes without fear of inquiries for the rest. Those who defend her (and if she belongs to the humbler classes the expense of her defence will probably not be incurred at all) can only stand by and sift the petitioner's proofs; for all counter evidence or proof of explanatory facts they will, in most cases, be wholly at a loss for want of the knowledge which alone could lead to their production. Could the bare issue of adultery, then, be fairly tried against a person so placed? And if not, did the statute, which, as I have endeavoured to shew, is so framed as to stipulate with scrupulous care for an equitable and meritorious view of conjugal delinquency on both sides, really intend to place a dissolution of his marriage within the reach of a husband upon an inquiry so one-sided and incomplete?

But if such an inquiry would be incomplete and inequitable on the fact of adultery on all matters of recrimination, on all charges of neglect or misconduct on the part of the husband himself, it would literally, in most cases, be no inquiry at all. Who is to know, much less find proof of the husband's cruelty? Who is to give the clue to, and bring to light, the neglect or misconduct which may have conduced to the wife's adultery? If, before the adultery, he has deserted her or separated himself from her, who is to meet or confute the facts he may put forward as a "*reasonable excuse*" for so doing? And these, be it remembered, are not only defences to the wife, but are by the statute made matter of public concern, and unusual means are enacted to preclude a decree of divorce from passing in any case in which they may exist. It is not too much to say that in the case of an insane respondent all the careful provisions and restrictions would become practically a dead letter; and as it is plain that the legislature did in no case intend that they should be so, I conclude that such a suit as this is not within the statute.

I have thus far proceeded on the reason of the thing. Authority

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on the subject there is but little. But what authority there is is directly against the continuance of such a suit as this. With the exception of the case of *Bawden* v. *Bawden* (1), this is the first attempt in this court to make an insane wife responsible in a suit for divorce. The judgment in that case was not an elaborate one; but no one, who reveres the sound legal capacity of my predecessor in this court as it deserves to be revered, can fail to attribute great weight to his decision. It is in entire conformity with the order now under review. In the ecclesiastical courts no case has been cited in which so much as a contrary dictum is to be found, and on the only occasion when the matter was mooted (*King* v. *King* (2)) the judge's notes shew an opinion in conformity with that of Sir C. Cresswell. In the record of divorce bills none is to be found against an insane wife. It may safely, therefore, be asserted that all previous authority is against the petitioner and the further maintenance of this suit. It is hardly needful to say that in the foregoing remarks I have made no allusion to the actual facts of this or any other case. The question is one of general principle, and I have so treated it. Neither has it seemed to me right to base any conclusion upon mere considerations of hardship that may arise out of a decision in one direction or the other. As far as the petitioner is concerned, there is no hardship, unless on the assumption of the respondent's guilt—an assumption we are not at liberty to make. If in no case, where the respondent is insane, is the petitioner entitled to claim relief, there may no doubt arise some cases in which the petitioner will suffer a grievous hardship. If, in all cases in which the respondent is insane, the petitioner is nevertheless entitled to proceed, there may be some cases in which the respondent will be the victim, not merely of hardship, but of fatal injustice. In whichever way the statute is interpreted, full and complete justice is not in all cases within reach of the Court. But this is the inevitable result of the malady with which the respondent has been afflicted, and which has rendered a fair investigation of the truth impossible.

In conclusion, I will advert to one other subject. It was suggested in argument that in staying the suit the interests of the co-respondents might be compromised. It might be sufficient,

(1) 2 Sw. & Tr. 417; 31 L. J. (P. M. & A.) 94. (2) See ante, p. 113.

Spu Rl. 157.

perhaps, to observe that the supposed hardships of the co-respondents are put forward not by them, but in the interest of the petitioner. The co-respondents themselves have not either of them appealed against this order, nor have they made any application regarding their costs. But if they had, I do not conceive that they have either the interest or the right to insist on a continuance of this suit, or that they can be wronged by its discontinuance. Suppose the respondent had died, could the petitioner have been obliged to continue the suit against the co-respondents? It must be remembered that the petitioner makes no claim for damages, and asks in his petition for no decree against them. They are made parties to the suit only because the statute peremptorily requires that they should be so. The object of this provision was, no doubt, to give them a locus standi to contest the proof of adultery. If no such proof is offered, their legal interest in the matter is at an end.

Is, then, a petitioner, it may be asked, who has commenced a suit, bound to go on with it, whether he will or no? Suppose, after the suit had begun, he sees reason to doubt whether his wife is guilty, is he bound to continue the investigation in open court in order to clear the reputation of the co-respondent? Or, again, if he forgive his wife and they come together again, as not infrequently happens, is he bound, for the sake of the co-respondent, to produce what he considers his proof of her infidelity in order that the co-respondent may meet it in open court? And if the Court were to hold that he were so bound, and that the suit must go on to a termination against the co-respondents, would the co-respondents obtain the end they are supposed to seek? No power of the Court can make the husband really try to prove adultery unless he is so minded. And the reputation of the co-respondents would be in no degree mended by the form without the substance of an adverse investigation. The truth is, that it is a misfortune inseparable from permitting a husband to charge his wife in public with adultery that the name and reputation of a third person (if known) should be exposed to compromise. If the parties are innocent, this cannot be otherwise than a grievous wrong which nothing can wholly redress, and for which there is no practical mitigation, but in that sense of justice on the part of the public

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which withholds a judgment until a charge is not only made but proved. I am, therefore, of opinion that the position of the co-respondents throws no light upon the propriety of the order now under appeal. Their position is the same as it would have been if the respondent had died, if the petitioner had found his proofs insufficient, and had ceased to urge them, if he had forgiven his wife and taken her back, or if, for any other reason whatever, he had ceased to demand relief at the hands of the Court. The order ought, in my judgment, to be affirmed.

I desire to add, that if the form of the present order should create any difficulty in the way of the petitioner appealing to the House of Lords, and if a dismissal of the petition will remove that difficulty, I shall be very willing to hear any future application that the condition of the respondent or other considerations may warrant the petitioner in making with that object.

KELLY, C.B. I am of opinion that the order in question should be rescinded or varied, and that the order to be made should be that further proceedings in the cause be stayed for such limited time as the Judge Ordinary shall think reasonable and expedient, unless the respondent shall, in the meantime recover, with liberty to either party to apply. The ground upon which I think that the postponement should at present be temporary only, is, that to decide the question now, and either grant the order in the terms prayed, or permit the cause to proceed notwithstanding the insanity of the respondent, may do great and grievous injustice and an irreparable injury to the one party or the other; whereas, a stay of proceedings for a limited time will meet the present exigencies of the case and do no wrong to either.

In considering the real nature of this order, and its ultimate consequences, I must disclaim any allusion to the parties before us in this particular case, and who, as no evidence has been taken on the petition, I shall presume to be free from all imputation. But, in dealing with the case, we must remember that our decision will govern all such cases hereafter, and determine the rights of all parties to a suit for dissolution of marriage on the ground of adultery, under whatever circumstances it may come before the Court. The order, although in its terms conditional, is in effect,

if the malady prove permanent, or should continue during the life of the petitioner, an absolute bar to the suit, a final judgment against the petitioner, and a denial of the redress which he claims to be entitled to under the provisions of the statute, not only as regards the wife, but against the co-respondents. If such an order be made, the consequence to a petitioner is that, although he may have evidence incontrovertible of the adultery of his wife, and a just claim to damages to a large amount against a co-respondent, he finds himself without any fault of his own, from an accident which he had no power to prevent, tied and bound to an adulterous wife for the remainder of his life, compelled by law to maintain her suitably to his own condition and rank and fortune, liable to the risk of spurious issue, his legitimate children or natural heirs despoiled of property, as by the wife's claim to dower, or to personalty passing to her, if he should die intestate, and himself for ever precluded from contracting marriage with another woman.

On the other hand, if the petitioner be permitted to proceed, the consequences are scarcely less calamitous to the wife, it may be an innocent wife, in a case in which more than in any other species of judicial inquiry, evidence may be given against her, which she alone may be able to contradict, or to explain away; and after a trial upon which, but for her insanity, she might have established a complete defence, she may recover her reason, only to find herself dishonoured and disgraced for ever by a sentence of divorce for adultery. I venture to think that this Court ought not to entertain a question, by its decision upon which it is compelled to choose between these two great evils, until at least the recovery of the respondent has become hopeless, and the Court is called upon ex debito justitiæ, by one party or the other, to make the order, and in effect put an end to the suit, or to allow the petitioner to proceed and entitle himself to the redress which he seeks.

It appears to be the result of the evidence upon the issue of insanity, as stated by the Judge Ordinary when this order was originally pronounced, "that persons suffering from puerperal insanity, for the most part recover within a year; some within eighteen months or two years, and some never." And it was then observed by the learned judge, "that it had been extremely probable at the outset that the lady, if deranged, would ere long cease

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to be so, and that there was some not unreasonable hope of her recovery still." The learned judge further observed, "that whatever be the case in reference to permanent insanity, whether it ought to bar a suit or not, it may with some force be argued that until all well-founded expectation or fair hope of the respondent's being able to answer the petition be dispelled, the petitioner ought for a reasonable time at least to be forbidden to proceed without that answer." I entirely concur in the view thus taken of this case, I believe as late as the month of April last, and I am still of opinion that the disastrous consequences which may or must ensue, whenever the Court is compelled to decide this question, are such as imperatively to call upon the Court to vary and qualify this order, and stay the proceedings only for a limited and definite time.

But from the view taken of this case by the Judge Ordinary and my Brother Keating, it becomes necessary to consider what power or jurisdiction this Court possesses to make an order, which, in case the respondent should not recover, operates as a judgment against the petitioner, and a final bar to the suit. And here it is objected in limine that the Court has no power to appoint or to recognize a guardian ad litem to the respondent, and that, therefore if the cause proceed, no defence at all can be made on her behalf. But I am clearly of opinion that such is not the law or the practice of the Court. I conceive it to be a power inherent in all the superior courts of law and equity, to appoint a guardian ad litem to any infant or lunatic who may be a party to a suit, whether ex motu proprio, or at the instance of any fit and proper person willing to assume and perform the duties of the office. All the cases on this point referred to on one side or the other, are uniform to shew that it has always been the practice of courts spiritual, as of other courts of law and equity, to appoint and recognize guardians to minors and lunatics, parties to suits before them. In *Barham* v. *Barham* (1), a wife, a minor, plaintiff in a suit against her husband for cruelty and adultery, appeared by a curator ad litem, and in *Beauraine* v. *Beauraine* (2), a curator ad litem was appointed to the respondent, a minor, sued by his wife for a divorce by reason of cruelty and adultery. This appointment was afterwards set aside by reason of the guardian having refused to accept the office.

(1) 1 Hagg. Const. 5.

(2) 1 Hagg. Const. 498.

But the practice for a minor to appear by guardian in such a suit was not questioned. And in *Hancock* v. *Peaty* (1), in a suit of nullity of marriage by a wife against her husband on the ground that she was insane at the time of her marriage, the petitioner appeared by her guardian, her brother, specially assigned by the Court at his own instance, and the suit was carried on and a decree of nullity pronounced, the plaintiff being a lunatic, and therefore incapable of acting herself, and having appeared by her guardian from the beginning to the end of the suit. In *Parnell* v. *Parnell* (2), a husband a lunatic was permitted to institute and carry on a suit by his committee or guardian against his wife for a divorce, by reason of adultery, and the principle on which the practice rests was clearly laid down by Lord Stowell. This case is important as shewing conclusively that the insanity of a petitioner or plaintiff is no bar to a suit or a decree for a divorce by reason of adultery, and inasmuch as adultery may be set up by way of recrimination as a defence against such petition, it seems to follow that insanity is no bar to such a charge against a lunatic, and that he must defend himself against such charge through his guardian or committee.

From what fell from the Court in that case, it is also clear that, if necessary, the Court of Chancery might be applied to to appoint a committee, either generally, or for a limited purpose, as ad litem, in any suit and in any court. And in the case now before us the Court has assumed and exercised this power; and it is under the appointment by the Court of the guardian, who is now conducting the defence of the respondent, that the trial of an issue has taken place, motions have been entertained, and the very order now in question has been made. If the Court had no power to appoint a guardian, and proceed with the suit against the respondent by her guardian, notwithstanding her insanity, what authority had it to try that issue, or to entertain this motion, receiving evidence upon oath vivâ voce, or by affidavit? And, above all, where was the authority to make the order now in question? All these acts or proceedings must be valid and binding alike on the petitioner, the respondent, and the co-respondent, or they are absolutely void, and they cannot be binding, if the Court had no power to proceed in the suit during the insanity of the respondent. And if they are

(1) Law Rep. 1 P. & M. 335. (2) 2 Hagg. Const. 169.

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void, how could the witnesses upon the trial, or the deponents upon the motion, be indicted for perjury? Or how can the act of the guardian, in appearing upon a motion, or in opposing or supporting this or any other order, be binding upon the petitioner, or upon the co-respondents, or upon the respondent herself, if she should recover?

If it be said that the Court, being incompetent to proceed with the suit while the respondent is insane, it must, of necessity, resort to some kind of process, and receive evidence, before it can be informed or assured of the fact of the insanity, does not this shew that where the purposes of justice require that proceedings in a suit, whatever may be their nature, must be had, notwithstanding the insanity of one of the parties, it is, of necessity, that the Court must permit and entertain those proceedings without the personal participation of the party lunatic, and admit a guardian to appear and act on his or her behalf? If, then, the respondent be well represented by the guardian now before the Court, the question at once arises, is the permanent insanity of the respondent a final bar to the suit? Now, a suit for a dissolution of marriage is the creature of the Act of Parliament, and we must look to the Act itself to see whether an order having this operation and effect is authorized expressly, or by necessary implication, by any of its provisions. I conceive it is to misapprehend the question, to inquire whether the Court has power to go on with the suit, notwithstanding the insanity of the respondent, and that the true question is, whether the Court has any power to stop the suit, except by a final judgment in the cause upon the issue joined; or by default, as expressly directed by the Act; or for nonconformity to some rule or practice lawfully made or established under the authority of the Act. For unless a power is conferred upon the Court by the terms of the Act to bar the suit upon this ground, it has no more jurisdiction to do so than it would have had to entertain the suit and adjudicate upon it, if the Act had never been passed. A writ or process, or the whole proceeding in a suit, may be set aside for irregularity or bad faith; but in such a case the proceeding is not stayed, but set aside, and the party complainant may begin de novo; whereas here the power claimed by the Court is at once to put a stop to the suit, which bars the right of the complainant for ever. To refuse to proceed in a suit where either party

demands that it should be carried on to its natural determination according to law, and by an arbitrary act at once to bar the complainant of a statutory right for ever, appears to me to be an usurpation of authority and a denial of justice; and no instance occurs to me of such an act ever having been done by any Court. Where the proceeding with an action at law is stayed by a perpetual injunction, the writ restrains the party only, and does not operate upon the suit itself; and the injunction is founded upon some established rule or doctrine of equity which has obtained the force of law.

I must, however, except the case of *Bawden* v. *Bawden* (1), which is undoubtedly an authority in support of the order, and, being the decision of a very learned and eminent judge, is entitled to every consideration. But it can scarcely be said that that case was either argued or decided with all the attention which such a question deserved. The respondent was a pauper lunatic in a workhouse, her guardian the overseer of the parish; and the learned judge appears to have proceeded, at least in some measure, upon the authority of a case before Sir H. Jenner Fust, which, when examined into, turns out to be no decision at all. But were it otherwise, we, sitting here as a court of appeal, are entitled to review that decision, and bound to decide the great question before us upon its own real merits, after bestowing upon it the attention and the serious consideration which its high importance demands. Does the statute, then, confer this power? Does it not, in effect, prohibit the making of such an order, and render it imperative upon the Court to hear and proceed with the cause? By the 27th section of the statute 20 & 21 Vict. c. 85, it is made lawful for *any* husband to present a petition to the Court praying that his marriage may be dissolved on the ground that his wife has, since the celebration thereof, been guilty of adultery; and by s. 31, in case the Court shall be satisfied on the evidence that the case of the petitioner has been proved, then the Court *shall* pronounce a decree declaring such marriage to be dissolved. Where, then, is the power under this Act to make an order, by reason of the insanity of a party, or for any other cause not declared and specified in the Act, that a suit instituted in strict conformity to its

(1) 2 Sw. Tr. 417; 31 L. J. (P. M. & A.) 94.

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provisions shall not be heard, that the plaintiff shall not be permitted to give evidence in support of his petition, and shall be barred of his right, although his case be proved, to a judgment of dissolution of marriage, which right is expressly conferred upon him by this section of the Act of Parliament?

I must say that it appears to me that to make such an order would be in effect to insert a clause in the Act, which it does not contain, and in some such terms as these: "Provided always that in case the respondent shall become insane no further proceedings shall be had on any such petition unless and until such respondent shall recover." The language of the 30th and 31st sections seem to me conclusive against this interpolation of a defence which the legislature has not thought fit to authorize. For the statute here, in plain and express terms, enumerates and specifies the several cases in which the petitioner shall be disentitled to the relief sought. By the 30th section, in case the Court shall not be satisfied that the alleged adultery has been committed, or shall find the petitioner accessory to, or conniving at, the adultery, or that he has condoned the adultery, or that the petition is presented or prosecuted in collusion with either respondent, the Court shall dismiss the petition. Then, by the 31st section, the Court shall not be bound to pronounce such decree if the petitioner has been guilty of adultery, or of unreasonable delay in presenting or prosecuting the petition, of cruelty, of desertion, without reasonable excuse, or of such wilful neglect, and misconduct, as has conduced to the adultery. What authority has the Court to add to these cases, and disregard the express provisions before referred to, that if the Court shall be satisfied that the petitioner's case has been proved, and shall not find any of these specified defences, then the Court shall pronounce a decree declaring such marriage to be dissolved? I forbear to trace the consequences of such an order as this into a later stage of the suit, except to observe that it might well occur that after evidence taken on both sides and closed, and when the Court, perhaps, without a jury is, to use the language of the Act of Parliament, "satisfied on the evidence that the case of the petitioner has been proved," the respondent might become insane after the case had been so closed, and the Court was about to pronounce a decree declaring the marriage to be dissolved. The suit would

thus have arrived at that stage at which the words of the statute are imperative, that "it shall pronounce the decree." Yet, if such an order can be made, the provision of the statute is absolutely set at nought. It would be well also to consider whether if the Court had pronounced judgment in favour of the respondent and dismissed the suit, and the petitioner, within the time allowed by the Act, were to appeal, and the respondent then should become insane, is the petitioner also in this case to be barred of the right of appeal conferred upon him by the statute?

If the making of this order be to contravene the provisions of the Act of Parliament, no question as to the analogy of a petition for a divorce to other proceedings, civil or criminal, can arise. But if it were necessary to deal with this question of analogy, I must say that I think there is no analogy whatever in a suit of this nature to an indictment for an offence against the criminal law, to which it has been assimilated in argument, and in which the personal presence of the accused and in a sane state of mind is indispensable. In a suit like this there is in the petitioner a right to a reparation for a wrong done, to damages against the co-respondent, and it may be to property or to interests in property, real or personal, which might otherwise pass to or continue in the respondent. Upon an indictment there is no such party to the cause, no right to redress for a personal wrong, or to damages, or to any interest in property, or affecting property involved in the proceeding. The party prosecuting is the Crown, representing the public; and no one is injured in either person or property by the suit being brought to an end without a trial or judgment. So far is a suit for divorce from partaking in any degree of the character of a criminal proceeding, that if such a suit had been instituted in any court spiritual before the Act establishing the Divorce Court, it could not have been conjoined with proceedings in pœnam, of a criminal nature, for adultery. The Court might pronounce sentence of divorce, à mensâ et thoro, but had no jurisdiction to inflict any penalty or punishment; and if proceedings of a criminal character had been instituted it must have been by means of articles, upon the office of the judge promoted, as by indictment at the suit of the Queen in a criminal prosecution at the common law, and then, and then only, in such criminal suit, could a sentence by way of

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penalty or punishment have been pronounced. And the jurisdiction to entertain a suit, in pœnam, for adultery, and to pronounce a sentence inflicting punishment, is still confined to the court spiritual, and is not conferred upon this court by the Act. This court, indeed, possesses no criminal jurisdiction at all.

It is true that a judgment of dissolution may operate as a punishment, but so also may any verdict or judgment in a civil action, whether for a wrong as a libel, or an assault, or to recover landed estate, as in ejectment, or to recover a debt or damages in an action of assumpsit or trover. Yet, in all or any of these cases, insanity is no defence and no bar to the suit, and no ground for a stay of proceedings. It is enough that the defendant has done a wrong, or given a right of action to the plaintiff for any of the causes above enumerated; in any such case, although after the wrong done, he may become insane, and so incapable of making his defence or instructing an attorney or counsel, a committee or guardian is appointed who conducts the defence, and the plaintiff enforces his legal right, and proceeds with the suit to verdict and judgment. Indeed, this doctrine was carried to its extreme length by Lord Eldon, who awarded a commission of bankruptcy, partaking both of a civil and criminal character, against an insolvent trader, who, after committing an act of bankruptcy, had become insane. Again, in an indictment for a criminal offence, a trial cannot be had or begun in the absence of the accused, because he has a right, not by way of procedure, but as parcel of the common law, to be asked whether he is guilty or not guilty, and to plead "not guilty" in his own person before he can be put upon his trial. In this suit, as in a civil cause for land, or debt, or damages, no such right exists. The Court may dispense with service of the petition, and proceed to trial and judgment in the absence of the respondent. In criminal cases, although the accused may have fled from justice, and his place of abode in a foreign country may be known, his personal appearance cannot be dispensed with, and no prosecution against him can be begun, continued, or ended, but in his presence.

In these suits again, as in all other civil proceedings, if the respondent or defendant has departed the realm, or secreted himself to avoid service of process, the service may be dispensed with, and the suit may proceed. Indeed, upon every act, step, and stage

of a cause the analogy to a civil suit is perfect, while to an indictment for a criminal offence it altogether fails. It is said that the status of the respondent is affected by the judgment, but so is that of the defendant in an action of ejectment involving a question of marriage or of illegitimacy. It is true that the judgment in such an action is not a judgment in rem; but this really makes no difference. Upon an information in respect of smuggled goods, exhibited under the revenue laws, the judgment is a judgment in rem that the goods be forfeited, but the insanity of the defendant would be no bar to such an information. Not only then is there no authority that a suit involving the status of one of the parties, or terminating in a judgment in rem, cannot be carried on against a lunatic; but the case before cited of *Hancock* v. *Peaty* (1) is a direct authority to the contrary; the judgment in that case being a judgment in rem, putting an end to the status of marriage, and the suit having been carried on from the beginning to the end while one of the parties, whose marriage was declared null and void, was a lunatic, and appeared throughout by her guardian.

But another objection arises to this order, which appears to me to be insuperable. We find that in this case two gentlemen are, under the exigency of the 28th section, made co-respondents. We must consider, therefore, how they are affected by this order, and in what condition they are placed. They are charged with acts of adultery with the respondent, the wife of the petitioner—a charge, if either of them be married, of a double adultery, and, in that case, of such a nature that, until disproved, it may disturb or be fatal to the domestic peace and happiness of the accused and of his wife. Or, if the petitioner has been the friend of the co-respondent, the charge may involve the imputation of the basest treachery or ingratitude. Upon what ground can the Court deprive a co-respondent, in such a case, of his right to insist that the suit shall proceed to judgment; that he shall be enabled to deny and disprove the charges made against him? It was suggested during the argument that the suit might be continued against the co-respondents only. But that is not so. A petitioner may, under the 33rd section, proceed for damages alone against an alleged adulterer with his wife; and by s. 11 of 21 & 22 Vict. c. 108, the

(1) Law Rep. 1 P. & M. 335.

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Court may, after the close of the evidence for the petitioner, direct that the co-respondent be dismissed. But neither of these provisions applies to the present case; for here the petitioner has proceeded against the respondent and co-respondents jointly, and had he proceeded against the co-respondents alone, the insanity of the wife would not have affected the suit, and no such order as this could have been made. So here the evidence is not closed or indeed opened; but if it had been closed, it would only have been, if the case had failed, that the co-respondents could have been dismissed, and the dismissal would have been a proceeding in the suit, which this order forbids. There is, therefore, no power in the Act conferred upon the Court either to direct or permit the cause to proceed against the co-respondents under the circumstances of this case. Indeed, if the petitioner had the power, and were so to proceed, and the wife were afterwards to recover, the adultery might be tried twice over, and with different results; the co-respondents might be convicted of adultery with the wife, and made to pay large damages, and the wife might be acquitted of adultery with the co-respondents. Then let us look again to s. 28. If the insanity of a respondent wife puts an end to the suit, so also must the insanity of a respondent husband against whom a divorce for adultery is sought under the 28th section. And here a lady may be made a co-respondent, and charged with adultery with another lady's husband; and if this husband becomes insane, the suit must be stopped, and the lady, stigmatized as an adulteress, must pass the remainder of her life with this charge hanging over her head, unable to bring her accuser to the proof, and insist upon her acquittal, the petitioner, in the meantime, averring her guilt, but unable also to bring forward her evidence and substantiate her charges.

But further, it is provided in this clause that either party may insist on having the contested matter of fact tried by a jury. Such an order as this absolutely repeals this all-important provision of the statute. What power has the Court so to obliterate this portion of the Act of Parliament, and take upon itself to deny alike to the accuser and the accused this great privilege conferred upon them by the legislature? Next, how does this order affect the petitioner with respect to the co-respondents? Here there is

no claim for damages; but in cases hereafter to be governed by this decision, the petitioner may have a just claim, which he seeks to enforce against a co-respondent to large and exemplary damages. How is he to recover them? How is justice to be done? The action of crim. con. is at an end, and the order expressly forbids any further proceedings in the suit, unless the chief respondent shall recover. Can it be that the legislature intended to perpetrate this wrong?

Then as to the costs. The petitioner or the co-respondents may have incurred considerable or absolutely ruinous costs. Are there to be no means of recovering them, even where the facts of the case entitling the one party or the other to claim them may be capable of clear and immediate proof? I cannot but think, that if the legislature had intended that the Court should have power to make such an order as this, provisions would have been found in the Act for doing justice as well to the petitioner and to the co-respondents as to the party in whose favour the order is made.

Lastly. It has been said, that as by the Act of Parliament the respondent may set up matters recriminatory by way of defence, it would be unjust to allow the petitioner to proceed while the respondent is in such a condition as that she cannot avail herself of the statutory defences. But the same argument might be urged in every civil cause where the defendant has become insane. The answer is that no such incapability exists, for the guardian of the respondent may plead and give evidence in support of the plea of recrimination, in the like manner as the respondent herself. It is true that a rule has been made under the authority of the statute, that a plea of recrimination must be verified by affidavit, and it is clear that no affidavit can be made by an insane respondent, and if the necessity for this affidavit had arisen under the statute, it would, no doubt, have presented the argument in a much stronger form. Where, however, the statute requires the petition to be verified by affidavit (s. 41), the petitioner is to file an affidavit verifying the same only "so far as he or she is enabled to do so." But if the statute is imperative that the Court shall pronounce for a dissolution of marriage, if satisfied upon the evidence that the charge in the petition is established, I conceive that it is not competent to this Court to make an order, the indirect effect of which would be to disable itself to proceed as required by the terms of

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the statute. And, as before observed, *Parnell* v. *Parnell* (1) is an authority that the committee of a lunatic husband may sue for adultery, although the wife might in such a suit plead recrimination by way of defence, thus putting the lunatic husband in the condition of a respondent.

It is undoubtedly a great evil that a woman, perhaps an innocent woman, should be made to undergo a trial in a case of this nature, while labouring under a state of mind, which subjects her or those who represent her in the suit, to many and great disadvantages in making her defence; and the grievance is but partially mitigated by the consideration that a judge or jury could not fail to have regard to her unhappy condition, while dealing with the evidence adduced against her. But whether the evil is so great as to overbalance the wrong done to a husband, who, with possibly conclusive evidence that his wife is an adulteress, finds himself bound to her for a lifetime by a tie that is indissoluble, and denied for ever the redress that he had been taught to believe an Act of Parliament had secured to him, is a question well worthy the serious consideration of the legislature. But I think that the legislature should have a voice in it, and that it is not for this Court to attempt to settle the question by a law of its own making. To the legislature, therefore, the question should be left. And if, at last, it be its will that a husband is to be thus dealt with, it is to be hoped that the Act to be passed may contain provisions under which something like justice may be done, as well to him as to all the other parties to the suit.

Upon all these grounds I am of opinion that this order cannot be sustained, that the Court should stay the proceedings from time to time so long as a reasonable hope remains that the respondent may recover, but that when that hope shall have ceased, the petitioner should be permitted to proceed with his suit.

In accordance with the judgments of the majority of the Court the order of the Judge Ordinary was affirmed, and the appeal dismissed with costs.

Attorney for petitioner: *B. Hunt.*

Attorneys for respondent: *Benbow & Saltwell.*

(1) 2 Hagg. Const. 169.

IN THE GOODS OF MARIA DAWES. 1870

June 28.

Testamentary Suit—Administration pendente lite over the Property of Deceased's Husband.

A married woman, under a power given to her to that effect, duly executed a will. Her husband, by his will, made her universal legatee and sole executrix. She survived him, but did not take probate of his will nor re-execute her own. Litigation having arisen on the question whether the wife's executors were entitled to a limited or general grant of probate, the Court appointed an administrator pendente lite to the estate of the husband, as well as one to the estate of the deceased.

MARIA DAWES, of Hyde Park Gardens, Middlesex, widow, died on the 2nd of January, 1870. On the 20th of July, 1869, in the lifetime of her husband, Henry Dawes, and by virtue of certain powers enabling her to do so, the deceased duly executed a will, in which she appointed Maria Willock executrix, and William Phelps executor. Henry Dawes, the husband, also executed a will, in which he appointed his wife universal legatee and sole executrix. Mrs. Dawes survived her husband, but did not take probate of his will, nor re-execute her own after his death. A suit having been instituted to determine the question whether the executors under Mrs. Dawes' will were entitled to a general or limited grant of probate,

Dr. Spinks, Q.C., for some of the next of kin of the deceased, applied to the Court to appoint an administrator pendente lite of the effects of the deceased. It is necessary to have a representative of the estate, who can give up possession of the leasehold house in which the deceased resided, receive the proceeds of the sale of the furniture therein, and the dividends due on her property, and pay the debts. He also asked that a similar administrator should be appointed of the estate of the husband, Henry Dawes, in whose estate the deceased was alone interested.

Inderwick, for the other next of kin, and *Searle*, for Miss Willock, one of the executors, did not oppose the appointment of an administrator, but objected to the person named by the next of kin on whose behalf the motion was made.

THE COURT granted the motion, both in reference to the estate

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of the deceased, as also of her husband, and directed the registrar to nominate the person to be appointed.

Attorney for five of next of kin: *W. Stacey.*
Attorneys for others: *Phelps & Bennett.*
Attorneys for executrix: *Wilde, Wilde, Berger, & Moore.*

July 5.

BELL *v.* FOTHERGILL AND OTHERS.

Will—Signature of Deceased cut out, but gummed into its original Place—Revocation.

On the death of the deceased a will was found, the signature to which had been cut out, but gummed on to its former place. The will had been in the custody of the testator up to the time of his death. Declarations of the deceased made subsequent to the date of the will were proved of an intention to benefit his wife by will. No other will was forthcoming:—

Held, that the presumption that the deceased cut out the signature animo revocandi was not rebutted, and that the gumming on the signature in its original place did not revive the will.

HENRY BELL, late of Alnwick, Northumberland, died on the 19th of December, 1868. On the 30th of September, 1847, he duly executed a will in which he nominated his wife, the plaintiff, sole executrix and universal legatee. The property of which he died possessed amounted in value to 700*l.* or 800*l.* The plaintiff as executrix propounded this will, and the defendants pleaded that it was not executed in accordance with the statute 1 Vict. c. 26, and that it was destroyed by the deceased with an intention to revoke the same. The will had been in the custody of the deceased, and was found by the plaintiff after his death in a drawer with other papers. The signature of the deceased had been cut out and afterwards gummed or pasted in its original position, together with the rest of the front sheet of the will, to the back sheet.

A. Staveley Hill, Q.C., and *Dr. Tristram*, for the executrix, contended that the presumption of revocation arising from the condition in which the paper was found, was rebutted by the evidence

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of recognition. They referred to *Harris* v. *Berrall* (1), *Patten* v. *Poulton and Others.* (2)

A. L. Smith, for the defendants, cited *Hobbs* v. *Knight* (3), and Williams on Executors, vol. 1, p. 137.

July 5. LORD PENZANCE. The question in this case is, whether a will of the deceased bearing date the 30th of September, 1847, is entitled to be admitted to probate. It was duly executed, and after the deceased's death, which took place on the 19th of December, 1869, was found in his drawers with other papers. The signature had been cut clean out, above, below, and cross-ways, apparently by a pair of scissors, but the paper so cut out had been placed in its position again, and gummed there, and the question is whether, under these circumstances, the will can be admitted to probate. The account of the finding of the will is given by the widow, who is also the universal legatee named in it. She says, that originally it was kept in a tin box in her bedroom, with other valuable papers, that it was endorsed as a will, and that she was quite familiar with its appearance; that she had seen it in the tin box within two years of her husband's death. That on the day following his death she went to a drawer which was called her husband's drawer, and the keys of which he usually kept, and she there saw the will with a string round it, together with other papers and loose money, which he had not cared to take up-stairs to his tin box. No one was with her when she found the will. She saw the signature, but did not notice anything unusual or exceptional about it. It was not detached or loose. On that day she locked the drawer and put the key in her pocket, and did not open it again until the day after the burial. She then took out the will and gave it to her brother. It was then in the same state it is now. From this account I conclude that although Mrs. Bell did not notice the particular state of the signature on the day after the deceased's death, it was probably then in the same condition as on the day after the burial, and, therefore, that at the time of the deceased's death, the will was in the same state as it is now. The question is, what is the legal result of this state of things. In *Davies* v. *Davies and Evans* (4) the marginal note is "a will found

(1) 1 Sw. & Tr. 153.
(2) 1 Sw. & Tr. 55.
(3) 1 Curt. 768.
(4) Lee, 445.

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with the seal torn off, in the repositories of the deceased: held that the act was done animo cancellandi." I merely refer to this case for the general proposition contained in it, namely, that when a will has always remained in the custody of the deceased and is cancelled, the Court will presume that it has been cancelled animo revocandi by the deceased himself. The same doctrine is laid down in Williams on Executors, pt. 1, bk. 2, ch. 3, § 1, vol. 1, p. 151, 6th ed. "If a testament was in the custody of the testator, and upon his death it is found among his repositories mutilated or defaced, the testator himself is to be presumed to have done the act, and it has already appeared that the law further presumes that he did it animo revocandi." See also *Lambell* v. *Lambell.* (1) These authorities establish the proposition that in the absence of evidence to the contrary, this Court is bound to presume that the testator did this act, the cutting out of the name, himself. If the paper had not been gummed on again, it is clear the Court must have further presumed that he did the act with an intention to destroy his will, and the question is, whether the presumption is altered because the name has been pasted on again, even assuming that it was pasted on by the deceased himself. I think not. Probably at one time the testator came to the determination to destroy his will, and subsequently having altered his mind, he thought, by pasting on the signature again, he could resuscitate it. The law does not uphold such a course. Lastly, is the presumption that the deceased did this act himself rebutted by his subsequent declarations? It is not necessary I should state at length the nature of these declarations. It is sufficient to say that they were general declarations, that he intended to benefit his wife by will, and they did not refer to the will as still in existence. With much reluctance I pronounce against the will. The costs of all parties will be paid out of the estate.

Attorneys for plaintiff: *Smith & Co.*
Attorneys for defendants: *Shum & Crossman.*

(1) 3 Hagg. Eccl. 568.

IN THE GOODS OF E. AINSWORTH. 1870 *July* 12.

Will—Words written below Signature of Testator—15 *Vict. c.* 24.

In a testamentary paper executed by the deceased the last sentence commenced immediately above the signature of the deceased and was continued in three short lines to the left of it, the two last lines being somewhat below the signature. This sentence was written before the deceased signed her name:—

Held, that under 15 Vict. c. 24, the execution was valid, and that the last sentence would be included in the probate.

ELIZABETH AINSWORTH, late of Southhills Hall, Bolton, Lancashire, widow, died on the 16th of April, 1870, having survived her husband, Peter Ainsworth, three months, he having died on the 18th of January, 1870. Some days before the 15th of April, 1870, the deceased produced to her sisters, Mary Anne Byrom and Emma Byrom, two papers, A and B, A being at the time pinned over and in front of B. A was to the following effect:—"Jany. 13th, 1863. If, unhappily, I should survive my dear husband, I give and bequeath any money of which I may die possessed, to my dear sister Harriet Brandrett for her life, and after her death to her children in equal proportions." B contained only legacies to her housekeeper and maid. At the time the deceased produced these papers to her sisters, her signature was at the end of the legacies in paper B; A was not signed by her. She addressed her sisters, "You, Emma and Mary Anne, will witness my handwriting;" and thereupon they signed their names on paper B, paper A having been turned back to enable them to do so. On the 15th of April the deceased produced another paper to her sisters, and duly executed it in their presence. The termination to it was as follows:—

"The two silver cups used at dinner to my sister Emma; also everything in brewhouse and wines, &c., &c., also all things in old room upstairs. Elizabeth Ainsworth. M. A. Byrom. E. Byrom."

This paper was in the handwriting of Mary Anne Byrom, and she stated that the last sentence was written before Mrs. Ainsworth signed her name.

Dr. Tristram moved for probate of the three papers. As A

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was pinned to B at the time B was executed, it forms part of the will. As regards the third paper, the execution is valid under the provision of 15 Vict. c. 24, the signature being opposite to the end of the will. The only doubt is whether the signature gives effect to the last bequest, some portion of which is below the signature.

LORD PENZANCE. I think all these papers ought to be admitted to probate. A and B are pinned together, and so form successive sheets of a will, and in that state they were produced to the witnesses. It is true that A was written before the husband's death, for the first words of it shew that; but I think it was quite competent to the deceased to pin that paper on to a sheet subsequently written, which she has done, and thus make it part of her will. Her signature was on B at the time she produced the paper to the witnesses, and she called upon them to witness her handwriting; she thereby acknowledged her signature, and as the two papers were both seen by the witnesses, I think they were well executed. As regards the third paper, there are some words at the bottom of it, partly written above and partly at the side of the deceased's signature. The only question is, were they there when the deceased signed her name? I am satisfied they were, and they will, therefore, be included in the probate.

Attorneys: *Williams & James.*

July 19.

IN THE GOODS OF PETER DITCHFIELD.

Administration with Will annexed of unadministered Estate—Grant to Representative of a Married Woman, Residuary Legatee.

A married woman, a residuary legatee under the will of the deceased, by virtue of powers enabling her to do so, executed a will by which she distributed the property of which she had a right to dispose, her residuary interest being part of such property. The chain of executors being broken, a grant of administration, with the will annexed, of the unadministered estate of the deceased was made to the limited representative of the residuary legatee.

PETER DITCHFIELD, late of Hindley, in the parish of Wigan, Lancashire, died on the 15th of February, 1830, having made his

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will dated the 23rd of February, 1826, in which he appointed his daughters, Mary Ditchfield, Elizabeth Ditchfield, Anne Ditchfield, and Louisa Ditchfield, executors and residuary legatees. On the 14th of April, 1830, probate of this will was taken in the Consistory Court of Chester by the three last-named executors.

On the 22nd of November, 1834, in anticipation of a marriage between Elizabeth Ditchfield and Henry Battersby, an indenture of settlement was executed which set out the property of the said Elizabeth Ditchfield, including her interest under the will of her father, and amongst other things authorized her, in the events which happened, to dispose of the same by will to be executed in the presence of three or more credible witnesses. Elizabeth Battersby died on the 8th of December, 1843, having survived the other executors and residuary legatees named in the will of Peter Ditchfield, and having left part of his estate unadministered.

On the 30th of August, 1837, under the powers given to her under the abovementioned settlement, she executed a will in which she appointed her husband, Henry Battersby, executor for life, and John Croudson, and John Leyland, executors on his decease. By this will she gave all the income arising from her separate estate to her husband for life, and on his death she divided such estate in equal moieties between the children of her sister Anne Croudson and of her brother Peter Ditchfield the younger. Henry Battersby survived his wife, but did not take probate of her will or administration of the rest of her goods.

He died on the 23rd of January, 1844, and on the 19th of December, 1855, administration, with the will of Elizabeth Battersby annexed, was granted to John Croudson, one of the executors therein named, limited to such personal estate and effects as the said Elizabeth Battersby had a right to and did dispose of by her will. The other executor, John Leyland, on the 19th of August, 1856, executed a renunciation of his right to probate of such will. John Croudson died on the 24th of November, 1864, intestate. Peter Ditchfield, the nephew of Elizabeth Battersby, and one of the residuary legatees named in her will, is about to obtain administration with the will annexed of the estate of Elizabeth Battersby left unadministered by John Croudson, and limited to such property as she had a power to dispose of.

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July 19. *C. A. Middleton* moved that, on Peter Ditchfield obtaining a grant of limited administration as last mentioned, a general grant of administration of the unadministered goods of Peter Ditchfield, with his will annexed, should issue to him.

LORD PENZANCE. I think this application must be granted. The applicant proposes to take administration, with the will annexed, of Mrs. Battersby, limited to such property as she had a power to dispose of, and has disposed of, by her will. The question, then, is, whether the share of Mrs. Battersby, in the residuary estate of her father, forms part of such property. If so, her administrator represents her interest in that residuary estate, and is entitled to a grant which will enable him to recover it.

Attorneys: *Duncan & Murton.*

July 19.

SLATER AND SLATER *v.* ALVEY.

Testamentary Suit—County Court Jurisdiction—20 & 21 *Vict. c.* 77, *ss.* 54, 57, 59—21 & 22 *Vict. c.* 95, *s.* 10.

By 20 & 21 Vict. c. 77, s. 59, it is provided, that where, in any contentious matter arising out of an application for probate or administration, it is shewn to the Court of Probate that the state of the property, and the place of abode of the deceased, were such as to give contentious jurisdiction to the judge of a county court, the Court of Probate may send the cause to such court:—

Held, that, where proceedings have been commenced in the Court of Probate, the court will receive evidence from both sides as to the state of the property, and the place of abode of the deceased, before it determines whether or not it will send the cause to the proper county court.

JOSEPH ALVEY, of Bulcote, in the county of Nottingham, yeoman, died on the 8th of September, 1869, having executed a will bearing date the 5th of June, 1869, and thereof appointed his daughter, Ann Slater, and Henry Slater, her husband, the plaintiffs, executors and residuary legatees. The plaintiffs propounded this will, and the defendant pleaded that it was not executed in accordance with the provisions of the statute 1 Vict. c. 26, that at the time the will bears date the testator was not of sound mind, and that the will was obtained by the undue influence of the

plaintiffs. Issue having been joined, an application was, on the 3rd of May, 1870, made to the Court to give its direction as to the mode of trial, and in accordance with the notice given to the defendant, the Court was requested to direct that the issues in the cause should be tried before the judge of assize by a common jury at the summer assizes, to be holden in and for the town of Nottingham. The defendant being quite willing that the cause should be tried as stated in the notice served upon him, did not attend by counsel when the motion came on for hearing, but the Court finding from the affidavits filed to support the motion that the personal estate did not in value amount to 200*l.*, and the real estate was valued at about 292*l.*, directed, under the 59th section of 20 & 21 Vict. c. 77, that the issues joined should be tried before the judge of the county court of Nottingham.

July 19. *Dr. Swabey* moved the Court to rescind the order so made on the 3rd of May, on the ground that his party was taken by surprise, and was prepared to prove that the real estate exceeded in value the sum of 300*l.* On his offering to read affidavits to that effect,

Searle, for the plaintiffs, objected. By the 57th section the affidavit as to the place of abode and state of the property of a testator or intestate, which is to give contentious jurisdiction to the judge of a county court under the provisions of the Act, shall be conclusive for the purpose of authorizing the exercise of such jurisdiction, provided that where it shall be shewn to the judge of a county court, before whom any matter is pending under the Act, that the place of abode or state of the property of the testator or intestate in respect of whose will or estate he may have been applied to has not been correctly stated in the affidavit, and if correctly stated would not have authorized him to exercise such contentious jurisdiction, he shall stay further proceedings in his court in the matter, leaving any party to apply to the Court of Probate. The matter being now pending before the county court judge at Nottingham, application should have been made to him and not to this court until he had suspended the proceedings. He referred to *Zealley* v. *Veryard.* (1)

(1) Law Rep. 1 P. & M. 195.

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Dr. Swabey contended that the 57th section applied only to the previous provisions of the statute, namely, the 54th section (now superseded by 21 & 22 Vict. c. 95, s. 10) and the 55th section. Those sections refer to the case where proceedings in the first instance are taken before the county court judge without the intervention of this court. In this suit the pleadings were completed in the Court of Probate, and the case comes under the proviso in the 59th section, that where in any contentious matter arising out of an application for probate in the principal registry, *it is shewn* to the Court of Probate that the state of the property and place of abode of the deceased was such as to give contentious jurisdiction to the judge of a county court, the Court of Probate may send the cause to such county court. The more reasonable interpretation will be, that it shall be shewn to the Court by affidavits from both sides.

LORD PENZANCE. I am clear that, as regards the Act of Parliament, Dr. Swabey's construction is the right one. It will not be enough that it be shewn to the Court by an affidavit that the state of the property is of a certain amount, but the Court must be satisfied of the truth of the averment, and that it can be only after hearing both sides.

Attorney for plaintiffs: *G. Cheatle.*
Attorney for defendant: *F. T. Dubois.*

July 26.

SHAW *v.* HER MAJESTY'S ATTORNEY GENERAL.

Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93)—*English Marriage dissolved Abroad—Subsequent Marriage—Validity.*

2 P. & M. 438
1 P. D. 144
1 P. D. 37-S
41

The petitioner, whose original domicil was English, and who married in England, resided for two and a half years in one of the states of America, and then petitioned the competent Court in that state for a dissolution of her marriage, on grounds for which, if proved, this Court would also dissolve an English marriage. No personal notice of the proceedings was given to the husband, who had never been within the state, and whose domicil continued to be English. The marriage having been dissolved, the petitioner remarried in America in the lifetime of her first husband:—

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Held, that a divorce so obtained could have no legal effect upon an English marriage, and therefore the second marriage was invalid.

It would appear that if the petitioner had been legally domiciled in the state at the time the divorce was granted, the English courts would have recognized and acted on the decree.

MRS. BETTY SHAW, widow, presented a petition under 21 & 22 Vict. c. 93, to the Court for Divorce and Matrimonial Causes, praying it to declare a marriage had between her and William Shaw, on or about the 22nd of September, 1859, at Rock Island, in the state of Illinois, United States, North America, to be a valid marriage. In her petition she stated that she was on the 26th of August, 1851, lawfully married at Halifax, Yorkshire, to William Suthers, and that such marriage was, on the 12th of September, 1859, dissolved by a decree or judgment of the District Court of Scott County in the state of Iowa, United States, North America, being a court of competent jurisdiction thereto, on the ground of the adultery of William Suthers and his desertion of his wife for three years and upwards without reasonable excuse. That subsequent to the said decree, to wit, on or about the 22nd of September, 1859, she was married to William Shaw, at Rock Island. This petition was served upon Her Majesty's Attorney General, who entered an appearance and filed an answer in which he traversed all the averments of the petition. On the 9th of February, 1870, a citation was taken out against William Suthers, the first husband, citing him to see proceedings, which was personally served upon him at Rochdale, Lancashire, on the 14th of February, but to which he entered no appearance. The cause was heard before the Judge Ordinary alone, on the 17th of June, 1870. The following facts were proved, that Mrs. Shaw's original name was Betty Jackson, and she was born at Hebden Bridge, Halifax, Yorkshire, and was married there on the 26th of August, 1851, to William Suthers, of Todmorden, in the same parish; that she continued to live with him at Todmorden, until September, 1853. That she then went to New York and Massachusetts without his knowledge or sanction, and remained there by herself, supporting herself by her own industry until June, 1854, where her husband joined her. They continued to reside together at Massachusetts until October, 1855, when they both returned to England, and went to live at Hebden Bridge, Yorkshire, where they continued to reside until March,

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1856. Suthers then left his wife and returned to America. He made no arrangement for her following him and no provision for her support in England. In March, 1857, the petitioner returned to America, to Massachusetts, where she stayed six months supporting herself, and then went to Scott County in the state of Iowa, where she had some friends, and worked as a sempstress. She remained in the state of Iowa for two years and a half. From March, 1856, and during the period she lived in the state of Iowa, the petitioner did not see or hear from her husband. In the year 1859 the petitioner presented a petition to the District Court of Scott County, state of Iowa, praying for a divorce from her husband William Suthers, by reason of his abandonment and adultery. By the order of that Court, in the absence of William Suthers, a notice of this petition was inserted in the *Davenport Weekly Gazette*, published at Iowa on the 4th of August, 1859, and in the three following papers; and on the 12th of September, 1859, in the absence of William Suthers, after due notice, the averments in the petition were taken for confessed against him, and the facts having been proved before a commissioner, the Court dissolved the marriage as prayed.

The petitioner was subsequently, on the 22nd of September, 1859, married to William Shaw, at Rock Island, in the state of Illinois, and in October, 1859, she and Shaw returned to England and continued to reside together as husband and wife at Hebden Bridge, until the 1st of April, 1869, when Shaw died. It was also proved that the District Court of Scott County, which is a branch of the Supreme Court, was legally authorized to dissolve a marriage for adultery and desertion where the petitioner had resided in the state of Iowa for six months, and if the respondent could not be personally served, after such a publication as had taken place in this case; and that a decree so made in the absence of the respondent, and without a residence by him in the state, is a valid decree which will be recognized in all the other states, and that the subsequent marriage was therefore a good marriage according to the law of Illinois. From a statement on oath made by William Suthers, and read during the argument, it appeared that in the year 1859, he was travelling in Canada on business, and that he never had any intention of giving up his English domicil. He received

no notice, and was quite ignorant of the proceedings for a divorce during their progress, and whilst he continued in America.

When the evidence was completed, the Court adjourned the further hearing of the case in order that the effect of a foreign divorce upon an English marriage might be fully argued.

Dr. Deane, Q.C. (*Dr. Swabey* with him), for the petitioner. It is proved that the Court which granted this divorce was a competent court for the purpose in the state of Iowa, and that the grounds for the divorce were recognized grounds in that state. Moreover, that the decree for a divorce made in Iowa would be acted upon in Illinois, and that a remarriage after such a decree is a valid marriage in this latter state. The question then remains, whether this Court will recognize a foreign decree of divorce, the marriage, the subject of such decree, having been celebrated in this country between parties who at the time were domiciled English subjects. In the cases which have been decided, the principle that English marriages cannot be dissolved has been gradually eliminated, and it has been determined that the question whether a foreign court can dissolve an English marriage depends upon the further questions whether the parties had a real residence within the jurisdiction of the court at the time the decree was pronounced, and also whether the grounds upon which the foreign court acted are the same as are admitted in this country. If both these conditions are fulfilled, this Court will receive the judgment and act upon it; but, if the parties have proceeded in fraudem legis in this country, no favour will be shewn to the judgment so obtained. In the present case the wife had a bonâ fide residence in the state of Iowa at the time she petitioned for a divorce. It has been held that if the husband is within the jurisdiction of this Court, and the wife not, he may still proceed to obtain a divorce; why should not the converse be true? The foundation of the principle that the domicil of the wife is that of the husband is community of interest, but the consortium is put an end to where the husband deserts his wife. As the petitioner was actually resident in Iowa when the decree was made, and it was made on grounds for which this Court would dissolve a marriage, it will be recognized here.

Sir J. D. Coleridge, S. G. (*Bourke* with him), appeared on behalf of the Attorney General. The question whether this divorce can

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be recognized in this country depends upon the domicil of the parties. It is now generally agreed that it is too strong to say, that under no circumstances, and by no foreign court, can an English marriage be dissolved. The true principle is, that a foreign court may dissolve a marriage of English people, provided that, at the time of the application for a divorce, they were domiciled within the jurisdiction of the court to which they appeal. This Court will repudiate the doctrine that a mere colourable domicil, a temporary residence, can give jurisdiction to a court, so that it can make a decree upon the status of the parties which will be binding in this country. The residence for such a purpose must amount to a complete domicil. In this case the husband swears, that in 1859 he was travelling about Canada on business, and that he never had any intention to give up his English domicil. The domicil of origin prevails until some other is acquired; and the intention to acquire a new one must shew itself by some act or expression of a will quatenus in illo est patriam exuere suam. Moreover, so long as the marriage is not dissolved, the wife can have no domicil separate from her husband. Assuming, however, that she could, the petitioner has not shewn that she intended to make the state of Iowa her permanent residence.

The cases referred to were: *Lolley's Case* (*Warrender* v. *Warrender*) (1); *McCarthy* v. *De Caix* (2); *Geils* v. *Geils* (3); *Conway* v. *Beazley* (4); *Tollemache* v. *Tollemache* (5); *Dolphin* v. *Robins* (6); *Pitt* v. *Pitt* (7); *Brodie* v. *Brodie* (8); *Maguire* v. *Maguire* (9); *Shaw* v. *Gould* (10); Story's Conflict of Laws, 304; Hosack on the Conflict of Laws, 286.

July 26. THE JUDGE ORDINARY. This was a petition by Betty Shaw, widow, praying the Court to declare a marriage had between her and William Shaw on or about the 22nd of September, 1859, to be a valid marriage. That marriage was proved, but it was also proved that the petitioner, on the 26th of August, 1851, at Halifax, Yorkshire, was married to one William Suthers, who is still alive. This last marriage was dissolved on the 12th of

(1) 2 Cl. & F. 563.
(2) 2 Cl. & F. 568.
(3) 1 Macq. 256.
(4) 3 Hagg. Eccl. 650.
(5) 1 Sw. & Tr. 558.
(6) 7 H. L. C. 300; 3 Macq. 563.
(7) 4 Macq. 627.
(8) 2 Sw. & Tr. 259.
(9) 7 Dana. 181.
(10) Law Rep. 3 H. L. 55.

September, 1859, by a decree or judgment of the District Court of Scott County in the state of Iowa, United States of America, which is said to have been a court of competent jurisdiction thereto in that state; and the only question I have to determine is, whether that divorce dissolved the English marriage according to English law?

The facts of the case are these. The marriage between the petitioner and William Suthers, as I have said, took place in August, 1851, at Halifax, in Yorkshire, near which place both parties up to that time had been resident. In 1853, the petitioner went to the United States by herself, and her husband followed her in 1854. In the following year they both returned to England, and continued to live together at Hebden Bridge, Yorkshire, until March, 1856, when William Suthers again went off to America. The petitioner followed him in March, 1857, to America, but did not join him. She supported herself as a sempstress; and, in August, 1859, she had been resident more than two years in the state of Iowa. In that month she commenced proceedings for a divorce in the proper court of that state. The Court has no reason to suppose that the petitioner had any collusive object in going to reside in the state of Iowa. At the same time there is no evidence to satisfy me that she ever obtained a domicil in the state of Iowa. She always had an intention to return to England, and ultimately did so. The husband went to the United States in 1857, and then to Canada, and he was in Canada during the period in which the proceedings for a divorce were being carried on in Iowa. No notice of these proceedings were personally served upon him. The citation was by advertisement; it did not reach him, and did not come to his knowledge. Everything took place behind his back. He never had an intention to give up his English domicil. These are the facts upon which I must decide whether the divorce can be held valid in this country.

The principles upon which the question here raised must be decided have been so recently discussed in several cases in the court of ultimate appeal, that it is not necessary to enter upon the discussion at large on the present occasion. It may be sufficient to observe, first, that *Lolley's Case* has never been overruled; secondly, that in no case has a foreign divorce been held to invalidate an English marriage between English subjects where the

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parties were not domiciled in the country by whose tribunals the divorce was granted. Whether, if so domiciled, the English courts would recognize and act upon such a divorce appears to be a question not wholly free from doubt; but the better opinion seems to be that they would do so if the divorce be for a ground of divorce recognized as such in this country, and the foreign country be not resorted to for the collusive purpose of calling in the aid of its tribunals. To my mind it is manifestly just and expedient that those who may have permanently taken up their abode in a foreign country, resigning their English domicil, should, in contemplation of English law, be permitted to resort with effect to the tribunals exercising jurisdiction over the community, of which, by their change of domicil, they have become a part, rather than they should be forced back for relief upon the tribunals of the country they have abandoned. But the inquiry is needless in this case, because it seems to me to be neither just nor expedient that a woman whose domicil is English, and whose husband's domicil is English, should, whilst living separate from him in a foreign state in which he has never, up to the time of the divorce, set his foot, be permitted to resort to the local tribunal, and without any notice to her husband, except an advertisement, which he never saw and was never likely to see, obtain a divorce against him behind his back. No case has ever yet decided that a man can, according to the laws of this country, be divorced from his wife by the tribunals of a country in which he has never had either domicil or residence. He has never submitted himself, either directly or inferentially, to the jurisdiction of such a court, and has never, by any act of his own, laid himself open to be affected by its process, if it never reaches him. A judgment so obtained has, therefore, in addition to the want of jurisdiction, the incurable vice of being contrary to natural justice, because the proceedings are ex parte and take place in the absence of the party affected by them. I must hold, therefore, that the first marriage was not dissolved, and, consequently, the second marriage is invalid; and I reject the prayer of the petition.

Attorneys for petitioners: *Edwards, Layton, & Jaques.*
Attorneys for Attorney General: *Gregory, Rowcliffes, & Rawle.*

SYKES *v.* SYKES AND SMITH.

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June 7.

Settlements—22 & 23 *Vict.* c. 61, s. 5.

The Court has no power to vary marriage settlements under 22 & 23 Vict. c. 61, s. 5, unless it be for the benefit of the children of the marriage or of their parents. A petitioner's father having covenanted to pay the respondent, after the petitioner's death, an annuity of 100*l.* during the joint lives of himself and the respondent, an order was made that after the petitioner's death the annuity should be applied for the benefit of the only child of the marriage; but the Court held that it had no power to deprive the respondent of the annuity in the event of her surviving the child.

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THE petitioner having obtained a decree dissolving his marriage, on the ground of the respondent's adultery, presented a petition for an alteration of the marriage settlement under 22 & 23 Vict. c. 61, s. 5. The parties were agreed as to all the alterations to be made in the settlement with one exception. Colonel Sykes, the father of the petitioner, had covenanted to pay to the respondent an annuity of 100*l.* after the death of the petitioner, and during the joint lives of himself and the respondent, or until the respondent should marry again. There was one child of the marriage, and it was agreed that the 100*l.* per annum should be applied for the benefit of the child instead of being paid to the respondent; but the question arose whether, in the event of the respondent surviving the child, she was entitled to the benefit of the covenant. This question was referred by the registrar to the Court.

Dr. Tristram, for the petitioner, moved that the registrar's report might be confirmed, and the settlement varied according to the agreement between the parties set out in the report. He further moved for an order that, in the event of the death of the child during the respondent's life, the annuity of 100*l.* covenanted to be paid by Colonel Sykes should be applied by the trustees of the settlement as if the respondent were dead. He cited *Callwell* v. *Callwell and Kennedy* (1), and *Gill* v. *Gill and Hogg*. (2)

Searle, for the respondent. The Court has no power under the

(1) 3 Sw. & Tr. 259. (2) 3 Sw. & Tr. 359; 33 L. J. (P. M. & A.) 43.

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statute to vary the settlements, unless it be "for the benefit of the children of the marriage, or of their respective parents." The proposed alteration cannot take effect until both the petitioner and the child of the marriage are dead, and it would operate, not for the benefit of the child or the parents, but for the benefit of Colonel Sykes or his representatives, who would be relieved from payment of the annuity to the surviving parent.

THE JUDGE ORDINARY. The object of the section is to enable the Court to divert the money to which a wife, who is proved to have been guilty of adultery, is entitled under settlement, from her, and to apply it for the benefit of her husband and children. It is plain, that when the husband and children are dead, the power of the Court is at an end. It cannot, therefore, relieve the father of the petitioner from the obligation of the covenant into which he has entered, and the application for an order for that purpose must be refused. The settlements will be varied according to the agreement between the parties set out in the registrar's report.

Attorney for petitioner: *B. T. Watson.*
Attorneys for respondent: *Cookson, Wainewright, & Co.*
Attorneys for co-respondent: *Dawes & Sons.*

June 10.

ALEXANDRE *v.* ALEXANDRE, THE QUEEN'S PROCTOR INTERVENING.

*Dissolution of Marriage—Intervention—Suppression of Material Facts—*23 & 24 *Vict. c.* 144, *s.* 7.

The 7th section of 23 & 24 Vict. c. 144, does not empower the Court to withhold a decree of dissolution of marriage on the ground of the suppression of material facts by a petitioner, when it appears upon all the facts being disclosed to the Court that the petitioner is entitled to a decree.

A petition contained two charges of adultery, and alleged that neither of them had been condoned. The Queen's Proctor intervened and proved condonation of one adultery but not of the other, and the Court made a decree absolute on the ground of the uncondoned adultery, notwithstanding the suppression of the material fact of condonation of the other adultery.

THIS was a petition by a husband for the dissolution of his marriage on the ground of his wife's adultery with some persons unknown.

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The respondent did not appear, and the cause was heard by the Judge Ordinary on the 9th of June, 1869. The Judge Ordinary considered that the adultery was sufficiently proved, and granted a decree nisi, but directed the Queen's Proctor to investigate the circumstances of the case. The Queen's Proctor afterwards intervened and alleged that the petitioner and the respondent had been acting in collusion, that material facts as to the conduct of the parties had been withheld from the Court; that the petitioner connived and was accessory to the respondent's adultery; that the petitioner condoned the respondent's adultery; and that the petitioner lived separate and apart from the respondent the greater part of the time between the marriage and the filing of the petition without contributing to her support, and by his wilful neglect and misconduct conduced to her adultery. Those allegations were denied by the petitioner, and the cause came on for hearing before the Judge Ordinary.

Sir R. Collier (*A.G.*), *Sir J. D. Coleridge* (*S.G.*), and *Searle*, for the Queen's Proctor.

G. Browne, for the petitioner.

It was proved on the hearing of the petition that the parties were married in Jersey, on the 26th of January, 1856, that they afterwards cohabited in Jersey for a short time, that they then separated, and that in October, 1860, during the separation, the respondent had given birth to a child of which the petitioner was not the father, that the respondent had been guilty of adultery in London subsequent to the birth of the child, and that in the months of March and April, 1868, subsequent to the date of such adultery, the petitioner and the respondent had resumed cohabitation and had lived together for a few weeks in lodgings in London. The respondent was examined as a witness on behalf of the Queen's Proctor, and she stated that before she returned to cohabitation in March, 1868, she confessed to the petitioner that she had given birth to an illegitimate child during the separation, and that he received her with a full knowledge of that fact, and allowed the child to live with them in their lodgings. She admitted, however, that she did not disclose to him any other acts of adultery of which she had been guilty during the separation.

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THE JUDGE ORDINARY. Assuming the respondent's evidence to be correct and she has given it very truthfully, it is plain that the petitioner, when he returned to cohabitation with her, condoned the adultery with the man who was the father of the child; but it is equally plain that he did not condone the other acts of adultery, for she did not communicate them to him. The petitioner relied not only on the adultery which he did condone but also on the adultery which he did not condone.

Sir R. Collier (*A.G.*) called the attention of the Court to the following paragraphs in the petition, and in the affidavit of the petitioner, verifying it:

"That on the 25th of March, 1868, your petitioner being informed that his said wife desired to meet him, went to Mrs. Urwin's, at New Cross, aforesaid, near London, and met there and then his said wife, and again thereupon lived and cohabited with her until the 24th day of April then next, when he ceased to live or cohabit with her in consequence of ascertaining for the first time the facts in the next paragraph of this petition set forth.

"That on the 12th of October, 1860, whilst your petitioner's said wife was so living apart and away from your petitioner, and had been so living apart and away from your petitioner since the month of February, 1858, your petitioner's said wife was delivered of a male child, of which your petitioner was not the father, but the father of which your petitioner has never been able to discover, although he has made every effort to do so."

From evidence now before the Court, it appears that this statement is a deliberate falsehood, and that the petitioner was perfectly well aware of the birth of the child when he resumed the cohabitation with his wife. The petitioner has been guilty of the suppression of most material facts, and on that ground the Court has power under the 7th section of 23 & 24 Vict. c. 144, to refuse to make the decree absolute, and it ought not to grant a divorce to a petitioner who has endeavoured to mislead it.

THE JUDGE ORDINARY. I quite agree that the petitioner did fail to bring before the Court some most material facts. In his petition he charged his wife with adultery on two separate occasions. The first adultery was that which resulted in the birth of a child.

Being aware that after the birth of that child he had taken her to live with him again, in his petition he endeavoured to explain his conduct by alleging that at the time he resumed cohabitation with her, he did not know of the birth of that child. In that way he endeavoured to get rid of the condonation which, according to the facts as they now stand, undoubtedly existed in respect of that adultery. So far, I think, the learned Attorney-General's argument is well founded, because it turns out now, assuming what this woman says to be true, that he perfectly well knew at the time he took her back that she had had a child. But there is nothing, as it seems to me, in the 7th section of the statute, that would justify the Court, on the mere proof that some material facts had been kept back, in refusing the petitioner his divorce, if it appears upon all the facts being known that he is in all other respects entitled to it. The suppression of a material fact is a sufficient reason to justify a third person, or the Queen's Proctor, in intervening; but when the material fact, whatever it may be, is brought to light and placed before the Court, there is nothing in the 7th section which would authorize the Court to withhold a decree if, upon the whole, supposing the fact had been brought to light in the first instance, the petitioner would have been entitled to it. Therefore, the Court has to consider whether, upon the whole, there is anything to justify it in withholding this decree, treating the facts now disclosed as if they had been brought before it in the first instance.

As regards the adultery which resulted in the birth of the child, I think the facts now disclosed are a complete answer to the petitioner's claim to a decree, because he condoned it. But there is another charge of adultery, which was established on the first hearing, and which is not only not refuted now, but is really supported by what the respondent has told us. In the eighth paragraph of his petition he alleges that from the month of September, 1867, till the month of March, 1868, she committed adultery with divers men, on divers occasions. And then he goes on to allege "That she lived as a prostitute at No. 7 Buckingham Place." At the trial he proved that charge by a policeman, who said that he saw this woman take men home to her house at night, on more than one occasion. When she was in the witness-box she refused to answer categorically as to all that she did at

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Buckingham Place; but with very great truth, as it seems to me, she acknowledged that subsequently to the birth of the child she had been guilty of adultery, although she denied that she had led the sort of life imputed to her; and I am the more inclined to believe her in that portion of her denial from the candour with which she admitted the rest of the charge. Then, substantially, the charge of adultery at 7 Buckingham Place is proved, and what answer is there to that adultery? It has never been condoned, because the husband never knew of it. When she went back to live with him, in 1868, she carefully concealed it from him—she was afraid to tell him. She told him of the child, and very possibly one reason for her doing so was that she was very anxious to have the child to live with her. But whether that was her reason or not, she admitted having committed herself, once, and having had a child; and she certainly kept back the life she had been leading in Buckingham Place. It seems to me, therefore, that as there was no condonation of the adultery there committed, I ought not to withhold the decree. At the same time, it was a most proper case for the Queen's Proctor to investigate. The Court would not have known the real facts of the case if the Queen's Proctor had not intervened; and the petitioner has only himself to thank for the intervention, because he deliberately inserted in the petition this false statement about the child. Of course I am aware that evidence might possibly have been produced on his behalf which might have contradicted the evidence now before the Court on that matter, but it is a collateral matter, and it is unnecessary to investigate it. It is sufficient to say that an adultery has been proved which has never been condoned, and therefore the petitioner is entitled to his decree.

Decree absolute accordingly.

Attorneys for the petitioners: *Hancock, Saunders, & Horsford.*
The Queen's Proctor.

SMITH *v.* ATKINS. 1870

Probate Practice—Leave to Appeal—20 & 21 *Vict.* c. 77, s. 39—*Costs.* *Feb.* 1.

Where there is an appeal from a final decree to the House of Lords, all interlocutory orders are under appeal, and it is unnecessary to obtain leave to appeal from such orders. Leave to appeal from an order discharging a rule for a new trial was refused on the ground that it was unnecessary, the final decree being under appeal.

An executrix having propounded a will in solemn form, the residuary clause, which was in her favour, was opposed, and the Court pronounced for the will, excluding the residuary clause from the probate on the ground that it had been obtained by her undue influence. The Court condemned her in the costs of the suit, with the exception of the costs of proving the will in solemn form, which she was allowed to take out of the estate.

THE plaintiff propounded the will of the late Eleanor Jane Atkins, in which she was appointed executrix and residuary legatee. The defendant, who was one of the next of kin, pleaded: 1, Undue execution; 2, Incapacity; 3, Undue influence of the plaintiff; 4, Fraud of the plaintiff; 5, That the deceased did not know and approve of the contents. The cause was tried before Lord Penzance by a special jury. In the course of the trial, the defendant obtained leave to amend the 3rd plea by alleging that the residuary clause, instead of the entire will, was obtained by undue influence. The jury found that the residuary clause was obtained by the undue influence of the plaintiff, and the Court decreed probate of the will without the residuary clause, and condemned the plaintiff in costs. A rule *nisi* for a new trial was afterwards granted, but after argument was discharged. The plaintiff had given notice of an appeal from the decree to the House of Lords.

Sir J. D. Coleridge (S.G.), Dr. Spinks, Q.C., C. Russell, Searle, and *Barclay* were for the plaintiff; *Ballantine, Serjt., E. James, Q.C.,* and *Dr. Tristram* for the defendant.

An application was made on behalf of the plaintiff for leave to appeal against the order discharging the rule for a new trial.

LORD PENZANCE. I think it is unnecessary to grant leave because there is to be an appeal against the final decree, and the

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39th sect. of 20 & 21 Vict. c. 77 enacts that, on the hearing of that appeal, all interlocutory orders complained of shall be considered as under appeal as well as the final decree. The Court has already pronounced for the will, excluding the residuary clause, and it now orders that the plaintiff be at liberty to take out probate; but if it be not taken out by her within a fortnight, that the defendant be at liberty to apply to the Court.

Dr. Spinks submitted that the testatrix as executrix of a will for which the Court had pronounced ought not to be condemned in costs.

LORD PENZANCE. As executrix she had a right to prove the will in solemn form, and to take the costs of so doing out of the estate. I will make it part of the order that on taking probate the plaintiff be at liberty to take the costs of proving the will in solemn form out of the estate, and I condemn her in the rest of the costs of the suit.

Attorney for plaintiff: *C. Mossop.*
Attorneys for defendant: *F. L. Soames.*

IN THE GOODS OF G. T. ROBINSON. 1870

Will—Contingent—Disposition dependent upon an Event. *Nov.* 8.

The deceased, a master mariner, whilst on a voyage, wrote with his own hand a will which commenced "This is the last will and testament of me, that in case anything should happen to me during the remainder of the voyage from hence to Sicily and back to London, that I give and bequeath," &c.:—

Held, that the dispositions of the will were dependent on the event referred to at the beginning of it, and that it had therefore only a contingent operation.

GEORGE TWIZELL ROBINSON, of the Commercial Road East, Middlesex, a master mariner, died on the 11th of September, 1870. In the year 1868 he was in command of a merchant ship called *Emily*, and on a voyage from London to Sicily and back. On the 16th of May, 1868, having arrived at the port of Cette, in France, he wrote in the British Consular Office at that place a will to the following effect:—

"Cette, May 16th, 1868. This is the last will and testament of me, George Twizell Robinson, that in case anything should happen to me during the remainder of the voyage from hence to Sicily and back to London, that I give and bequeath to Elizabeth Mitchell, my sister-in-law, all moneys that are in the bank belonging to my late wife, Helen Robinson, and myself; also life insurance, Master Mariner's Insurance, and also all household furniture, with the exception of 150*l.* to my brother-in-law, William Robert Petherbridge, and 30*l.* to my brother-in-law, James Tucker Petherbridge.

"G. T. Robinson."

The voyage was completed by the return of the ship to London in July, 1868.

The deceased had duly executed a will in June, 1864, by which in the event which happened of the death of his wife in his lifetime without children, he bequeathed the whole of his property to Helen Amelia Mitchell, Mary Anne Lindfield Mitchell, and Elizabeth Harries Mitchell. As the will above referred to had no residuary or revocatory clause, it was proposed to ask for administration with both papers annexed as together containing the will of the deceased.

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Searle moved accordingly. As the paper dated May, 1868, is in the handwriting of the deceased, who was at the time a mariner at sea, it is a valid instrument as regards execution. In its form it is not conditional. The deceased only refers to the voyage as a reason for making his will. [He referred to *Martin's Case* (1), and *In the Goods of Porter.* (2)]

LORD PENZANCE. The deceased in this case commences his will with the following words:—"This is the last will and testament of me." What is? "*That* in case anything should happen to me during the voyage from hence to Sicily and back to London, that I give and bequeath, &c." He therefore makes the dispositions of his will dependent on a certain event, namely, something happening on the voyage. In all these cases that there is a line of division between contingent and non-contingent wills is very apparent, although in the different circumstances of each case it may not be always very distinct. I am against this paper. I think it is conditional. By it the deceased distributes his property only in case he died on his voyage from Cette to London, whereas he survived it two years. Administration with the will of June, 1864, alone will be granted to Richard Mitchell, as guardian of the residuary legatees named in it, they being under age.

Proctor: *J. Wills.*

Nov. 9.

BENSON AND SANKEY *v.* BENSON.

Revocation—Cancellation—Presumption.

After the due execution of a will has been proved, the burden of proving that it was revoked lies upon those who set up the revocation, and, in the absence of evidence, revocation will not be presumed.

A will duly executed before the passing of the Wills Act, and remaining in the testator's custody until his death, after the passing of the Wills Act, was found with his signature crossed out. In the absence of evidence as to the date when the act of crossing out was done, the Court refused to presume that it was before 1838, and therefore pronounced for the will.

WILLIAM HENRY BENSON, formerly of the Bengal Civil Service, died at Cheltenham, in the county of Gloucester, on the 27th of January, 1870. After his death, a holograph will, signed by him,

(1) Law Rep. 1 P. & M. 380. (2) Ante, p. 22.

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was found amongst his papers. It was dated the 25th of August, 1834, and was endorsed on the outside "Last will and testament of me, William Henry Benson, Portsmouth, 25th August, 1834." There were some alterations and interlineations on the face of the will, containing references to events which had happened between the years 1842 and 1853, and there were lines drawn through the deceased's signature.

The plaintiffs, who were the two surviving children of the testator, propounded the will as universal legatees.

The defendant, who was the child of a deceased child, and entitled in distribution in case of intestacy, pleaded revocation by cancellation.

The plaintiffs took issue on this plea, and for a further replication said, "that the deceased, after the 31st of December, 1837, drew certain lines with a pen across his signature at the foot or end of the said will, without thereby obliterating his signature, and this act is the supposed revocation by cancellation of the will in the plea alleged." (1)

The defendant joined issue.

On the hearing of the cause, evidence was produced of the execution of the will in August, 1834, at Portsmouth, when the deceased was on his way to India; and it was proved that it remained in his custody until his death; that he returned from India in 1847, and that his wife, who, by the will, took a life interest in his property, died in 1853. There was no evidence as to the date when the lines were drawn through the signature.

Amongst the papers of the testator was found a cutting from a newspaper, on the subject of will-making, containing this passage: "Practically, it may be said that if you wish to revoke your will you must either reduce it to ashes, or, at least, tear or cut out your signature; for it will not do merely to cross out your name or the names of the witnesses, with the pen."

Dr. Spinks, Q.C. (*Inderwick* with him), for the defendant. In the absence of evidence, the presumption omnia rite esse acta must be applied to the act of cancellation. It is probable, from the

(1) The Wills Act (1 Vict. c. 26), s. 34, enacts "that this Act shall not extend to any will made before the 1st day of January, 1838."

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circumstance that the will was found in the deceased's repositories, with the signature cancelled, that he intended the cancellation to operate as a revocation, and the Court will give effect to that intention by presuming the act of cancellation to have been done before 1838, when the Wills Act came into operation: *Pechell* v. *Jenkinson* (1); *In the Goods of Pennington* (2); *In the Goods of Streaker.* (3)

Dr. Deane, Q.C. (*C. A. Middleton* with him), for the plaintiffs. The execution of the will having been proved, the burden of proving the revocation lies on those who allege it; and in the absence of evidence, revocation will not be presumed. In this case there are circumstances to guide the mind of the Court to the conclusion that the cancellation was not done until after the passing of the Wills Act. The alterations were clearly made after that date; and the testator's wife did not die until 1853, and there is no reason to suppose that he ever intended to deprive her of the life interest which he gave her by the will.

LORD PENZANCE. The simple question in this case is whether the testator did or did not revoke his will. The defendant affirms that he did revoke it; and the plaintiffs, who propound it, deny that he revoked it. For some reason, which is not apparent to me, the plaintiffs have added a further replication, asserting that the crossing out of the name was done after the Wills Act came into operation, and that this is the supposed revocation alleged in the plea. That is denied by the defendant. So that, although there is only one question in the case, there are two issues raised by the pleadings, in one of which the defendant takes on himself the affirmative that the will has been revoked, and in the other the plaintiffs take on themselves the affirmative that the revoking act was done after the Wills Act came into operation. It is plain, to my mind, that the will having once been proved to be well executed, the Court must in some way or another be satisfied affirmatively that it was revoked before it can pronounce against it. There is a lack of evidence as to the time when the act of cancellation was done. It is conceded that if it were done before the Wills Act came into

(1) 2 Curt. 273. (2) 1 Notes of Cases, 399.
(3) 4 Sw. Tr. 192; 28 L. J. (P. M. & A.) 50.

operation, it would amount to a revocation, and that if it were done afterwards it would not amount to a revocation.

The general history of the case affords the Court very little assistance in coming to a conclusion. The will is holograph, and was made in August, 1834, at Portsmouth, when the testator was on his way to India. There is no evidence to shew that it was executed in the presence of a professional man; but the deceased's mother-in-law and sister-in-law were present, and signed their names to it. The deceased remained in India for many years, and after his death the will was found with his signature crossed out.

On the one side it is argued that the Court ought to presume that the crossing out was done before the statute came into operation, on the principle of the presumption omnia rite esse acta. No doubt that principle is constantly referred to when the Court is driven to it by the absence of evidence; but it has far less weight when applied to the revocation than when applied to the setting up of a document.

In answer to that presumption, the plaintiffs say there are many circumstances tending to shew that the act was done after the Wills Act came into operation. There are, no doubt, various memoranda, in the nature of alterations, on the face of the document, each of them referring to events that occurred after the passing of the Wills Act. The plaintiffs' suggestion is, that as long as the testator's wife was alive he was content that the will should stand, but that after her death he altered his intention. The contrary hypothesis would lead to this difficulty, that, having crossed out his name before January, 1838, he made the memoranda on the will from time to time, in accordance with the alteration in circumstances, after he had so crossed out his name. But that is not impossible; for he may have used this will as the draft of a new will which he intended to make at a future time The Court, therefore, cannot very clearly see its way to any conclusion from these circumstances. But it is said that in some cases the Court has held that, where there are alterations in wills dated before the Wills Act, the presumption, in the absence of evidence as to the date of those alterations, is, that they were made before the Wills Act came into operation. I own I should have entertained the same doubt as that expressed by Sir C. Cresswell in

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In the Goods of Streaker (1) as to the propriety of those decisions, although I should be bound to follow them. But the present is not one of those cases. We are here dealing with what is an entirely different matter, a question of revocation. There is a principle with regard to questions of revocation upon which the Court always acts, and which is, I think, strongly applicable to this case. It is this, that when a will is once proved to have been duly executed, the Court must be satisfied that it has been revoked before pronouncing against it. In many cases it has happened that a will in a testator's custody has been found, after his death, obliterated in such a way as to amount to a revocation if he was of sane mind when he did it, and there has been no evidence whether it was done before or after he became insane. Does the Court, in the absence of proof, presume that it was done before he became insane, when it would amount to a revocation, or when he became insane, when it would not amount to a revocation? The answer is, that the Court always refuses to presume one way or the other, but holds that the party who alleges that it was done at a time when it would amount to a revocation must prove his allegation, and in the absence of proof the revocation falls to the ground. In *Harris* v. *Berrell* (2) Sir C. Cresswell said: "By 1 Vict. c. 26, every will is required to be executed as therein prescribed. If it is once proved that a will has been duly executed, I hold that it is entitled to probate unless it is also shewn that it has been revoked by one of the several modes pointed out by that statute. I am of opinion that the burden of shewing that it has been so revoked lies upon the party who sets up the revocation." That seems to me to be a sound principle, and it was adopted by the Court in *Sprigge* v. *Sprigge*. (3) In accordance with that principle, I hold that the burden of proving that the crossing out of the signature was done at a time when, according to the law of this country, it could effect a revocation, lies on those who assert the revocation; and in the absence of such proof, I am bound to pronounce for the will.

Attorneys for plaintiffs: *Vizard, Crowder, & Co.*
Attorneys for defendant: *Keighley & Gething.*

(1) 4 Sw. Tr. 192; 28 L. J. (P. & M.) 50. (2) 1 Sw. Tr. 153.
(3) Law Rep. 1 P. & M. 603.

DAVIES *v.* BRECKNELL. 1870

Testamentary Suit—Real Estate above 300l.—Mortgages—County Court Jurisdiction. *Nov.* 15.

The estate of the deceased consisted of personalty under 20*l.* in value, and realty valued at 370*l.*, but subject to a mortgage for 100*l* :—

Held, that the county court of the district within which the testatrix resided at the time of her death, had not, under 21 & 22 Vict. c. 95, s. 10, contentious jurisdiction in such a case.

THE plaintiff, Simon Davies, propounded the will of Elizabeth Bailey, late of Rotherham, Yorkshire, widow, bearing date the 26th of October, 1869, in which he was named sole executor. The defendant William Brecknell, pleaded that such will was not executed in accordance with the provisions of the statute 1 Vict. c. 26, that the deceased on the day the will bears date, was incapable of executing a will, and that it was obtained by the undue influence of Simon Davies and Harriet Davies his wife. Issue having been joined, the Court on the application of the plaintiff, on the 19th of July, 1870, ordered the cause to be tried before itself and a common jury.

On the 10th of November, 1870, the defendant gave notice to the plaintiff that he intended to move the Court to rescind the order as to trial so made on the 19th of July, and to direct that the cause be tried by the county court holden at Rotherham, in the county of York, for the district of Rotherham; and he filed an affidavit in which he stated that the deceased died at the union workhouse in Rotherham, on the 23rd of February, 1870, that the personal estate and effects of which the deceased died possessed were under the value of 20*l.*, that the only real estate of which she was seised consisted of two tenements or dwelling-houses and their appurtenances, situate in Rabones Lane, Smethwick, Staffordshire, which had been valued by Messrs. Cooksey & Son, estate valuers, at the sum of 370*l.* or thereabouts, and that such real estate was at the time of the death of the deceased in mortgage to Messrs. Edward and Alfred Caddick, solicitors, for securing 100*l.* and interest.

Dr. Tristram moved accordingly.

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Searle, for the plaintiff, objected that the defendant by his own affidavit shewed that the county court has no jurisdiction, inasmuch as the real estate of the deceased is worth 370*l.* The matter is governed by 21 & 22 Vict. c. 95, s. 10, which gives the jurisdiction to the county court only if the personal estate in respect of which probate or administration is to be granted, exclusive of what the deceased may have been possessed of or entitled to as a trustee, and not beneficially, but without deducting anything on account of the debts due and owing from the deceased, was at the time of her death under the value of 200*l.*, and if the deceased at the time of her death was not seised or entitled beneficially of or to any real estate of the value of 300*l.* or upwards. As the statute does not allow the debts to be deducted in calculating the personal estate, neither can a mortgage or other charge be taken into account in estimating the value of the real estate.

Dr. Tristram relied upon the word *beneficially.* The deceased was not seised, or entitled *beneficially* to real estate worth 300*l.*, as the estate was subject to a mortgage.

LORD PENZANCE. This Court cannot enter into the question to what charges the real estate is subjected. The construction put upon the section on behalf of the plaintiff is the right one, the value there mentioned is the actual value of the property free from all questions as to mortgages or other charges. I reject the motion with costs.

Attorneys for plaintiff: *Learoyd & Learoyd.*
Attorneys for defendant: *Duncan & Murton.*

WRIGHT *v.* ROGERS AND GOODISON (WINTERBURN INTERVENING). 1870

Testamentary Suit—Probate ordered to be delivered out—Appeal—Administrator pendente Lite—Practice. *Nov.* 15.

A suit having been instituted to try the validity of the will of a deceased, and judgment having been given to establish it, one of the parties appealed from such judgment to the House of Lords. Notwithstanding the appeal, the judge of the Court of Probate ordered probate to be delivered out to the executors named in the will.

A difficulty having arisen in the Court of Chancery as to the power of the executors to give a good title to certain leasehold property belonging to the deceased's estate, under the probate and pending the appeal, the Court ordered the probate to be brought into the registry, and thereupon that letters of administration pending suit should be granted to such executors.

THOMAS PEARCE, late of Albion Grove West, Islington, died on the 4th of April, 1868, and on the 23rd of April, 1868, probate of his will dated the 2nd of April, 1868, was granted in the principal registry of the Court of Probate to Richard Rogers and Richard Goodison, the executors therein named. In March, 1869, on the application of Caroline Wright, the plaintiff, the probate was brought into the registry and the executors propounded the will. The plaintiff pleaded that the will was not duly executed in accordance with the statute 1 Vict. c. 26, and other pleas, which, however, were not relied upon at the hearing. On the 15th of June, 1869, the cause was heard by the Court itself without a jury, and the judge pronounced for the will, and on the application of the executors directed that the probate should be delivered out to them. (1) On the 21st of July, 1869, the plaintiff, Caroline Wright, filed a notice of appeal to the House of Lords, and on the 10th of August lodged her petition and appeal which was subsequently answered by the executors, and the appeal now stands for hearing. In the year 1868 a suit was instituted in the Court of Chancery, to administer the estate of the deceased, and it was certified by the chief clerk of Vice-Chancellor Sir J. Stuart, to whom the matter had been referred, that besides other property the personal estate of the deceased included a sum of 1590*l.*, the purchase-money of two leasehold houses sold in June, 1868, to Mr. Brocklesby.

(1) Law Rep. 1 P. & M. 678.

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In consequence of the proceedings in the Court of Probate and on appeal, Mr. Brocklesby declined, and still does decline, to complete his purchase of such houses, and on an application to the Vice-Chancellor, by the executors, for leave to take proceedings against Mr. Brocklesby to compel him to complete such purchase, His Honour refused the application on the ground that notwithstanding the 77th and 78th sections of the Probate Act, 1857 (20 & 21 Vict. c. 77), the executors could not, owing to the pending appeal, make such a title to the leasehold premises as the purchaser was entitled to require. Moreover, the executors could not (they were advised) wind up certain partnership transactions in which the deceased was engaged, and which it was necessary should be attended to at once, under the probate and pending the appeal.

Dr. Tristram moved the Court to grant administration pending suit, to the executors named in the will in litigation, who were also the executors in an earlier will of the deceased. They were willing to bring in the probate which had been delivered out to them.

Inderwick, for Mrs. Winterburn, the intervener, consented to the application.

Dr. Swabey, for the plaintiff, could not consent to, but was not authorized to oppose, the application.

LORD PENZANCE ordered, that on the probate already granted being taken into the registry, letters of administration pending suit should issue to the executors.

Attorneys for plaintiff: *Hensman & Nicholson.*
Attorneys for defendant: *Belfrage & Middleton.*
Attorney for the intervener: *J Taylor.*

CARRITT *v.* CHRISTIAN AND VINE. 1870

Testamentary Suit—Verdict for the Will—Compromise—Embodiment of Terms in Order of Court—Practice. *Nov.* 22.

During the progress of a testamentary suit, a compromise was entered into by the parties and committed to writing. A verdict was thereupon given for the validity of the will, but no order made as to the costs. The Court, two years afterwards, refused to permit the terms of compromise to be embodied in an order to be enforced as a rule of Court.

THIS was originally a testamentary suit, in which the plaintiff, Frederick Carritt, as executor, propounded a will of Frederick Vine, late of Belle Villa, St. Leonards-on-Sea, Sussex, gentleman, dated the 12th of November, 1867. The defendant, William Christian, opposed the validity of this will on the usual pleas, and further propounded, as sole executor, a will of the deceased, dated the 9th of January, 1865. The other defendant, William Frederick Vine, as heir-at-law and only next of kin of the deceased, was cited to see the proceedings.

The questions at issue were tried before the Court and a special jury, on the 6th and 10th of March, 1869, when a compromise was entered into by the parties, and a verdict given in favour of the will dated the 12th of November, 1867. The Court pronounced for that will, but refused to make any order as to costs. A memorandum as to the terms of compromise was signed by counsel for each party. It was to this effect:—Verdict for the plaintiff. Costs of all parties out of the estate, so far as the estate will go. If any residue after the payment of costs, debts, and legacies, the same to be divided equally between Mr. Carritt and Mr. Christian. The plaintiff, acting under advice, had paid the costs he had incurred as executor, and also, so far as the estate realized would permit, a legacy of 1000*l.* given by the will. The costs of the defendants had not been paid.

Inderwick, for Mr. W. F. Vine, the intervener, moved the Court for an order to be drawn up, embodying the terms of the compromise, which had been signed by the counsel for the parties; and that the plaintiff should be ordered to pay to Mr. Vine the costs

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incurred by him or on his behalf, as between solicitor and client. By 20 & 21 Vict. c. 77, s. 37, on the trial of any question before a jury, the Court of Probate has the same power, jurisdiction, and authority as belong to any judge sitting at nisi prius. At nisi prius it is very usual for terms of compromise to be made an order of the Court, and it is found to be a convenient practice. He referred to *Harvey* v. *Allen* (1), and *Roadnight* v. *Carter and Another*. (2)

Dr. Spinks, Q.C., appeared for the plaintiff.

Bayford, for the defendant, William Christian.

LORD PENZANCE. The Court has long since discovered, from a great number of cases which it has had before it, that there is no use embodying terms of compromise in its order, for, practically, they cannot in many instances be enforced in this court. If a fraud of any kind has been practised in order to obtain a decree, the Court will give its assistance, by allowing the cause to be set down to be heard a second time. That is a very different case from the present. As to particular terms of compromise, possibly an action may be brought to enforce them; but it is contrary to the practice to embody them in an order of the Court. The motion is rejected with costs.

Proctor for Mr. Vine: *G. R. Longden.*

Proctors for plaintiff: *Moore & Currey.*

Attorneys for Mr. Christian: *Eldred & Andrew.*

(1) 1 Sw. & Tr. 151. (2) 3 Sw. & Tr. 421.

IN THE GOODS OF MARY FRASER. 1870

Married Woman's Will—Trustees—Executors according to the Tenor. Dec. 6.

A married woman, who, under a deed of settlement, had a power of appointment by will over a trust fund, executed a will in which she directed the trustees of her marriage settlement to distribute her property in a particular way in accordance with the terms of such settlement, and gave them all the necessary powers of sale and mortgage the more effectually to carry her will into execution:—

Held, that the will was the mere execution of a power for the distribution of the funds already in the hands of the trustees, who, in such distribution, would still act under the settlement, and that they were not executors according to the tenor of the will.

MARY FRASER, of Scarborough, Yorkshire, died on the 9th of November, 1870. In the year 1837, in anticipation of a marriage (which subsequently took place) between the deceased, then Mary Taylor, and Hugh Fraser, a deed of settlement was executed by which certain freehold property situate in Yorkshire was conveyed to Edward Yardley (since deceased), and William Corrie and their heirs upon trust to sell the same, and hold the proceeds, together with 3000*l.* 3 per cent. consolidated bank annuities in trust to pay the annual income to Mary Fraser for her life to her separate use, and without power of anticipation, and on her death to Hugh Fraser for his life. In the event which happened, namely, there being no children of the marriage, the trustees were to hold the property, subject to the life interests of Mr. and Mrs. Fraser, upon such trusts and to and for such intents and purposes, and with, under, and subject to such powers, provisoes, and declarations as the said Mary Fraser (notwithstanding her coverture, or whether married or sole) by her last will and testament, in writing, should direct or appoint; and in default of such direction or appointment, or in case the same was incomplete or ineffectual, then the said trust premises, or the unappointed or the inffectually appointed parts thereof and interests therein, were, in case Mary Fraser survived her husband, to be in trust for her absolutely. The settlement also contained a covenant that all personal property above the value of 100*l.*, which, during coverture, Mary Fraser, or her husband in her right, should become possessed of or entitled to, should be assigned to the trustees, and be

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subject to the provisions of the settlement. On the 22nd of June, 1846, Mary Fraser duly executed a will to the following effect: "This is the last will of me, Mary Fraser, of Adelaide Road, Middlesex. I direct the trustees under my marriage settlement to pay the sum of 1000*l.* to my sister Mrs. Yardley, ... and, if after the payment of such legacies as may become due under this my will, the residue of my property shall not be worth more than 7000*l.*, then I give the whole to my sister Ann Taylor, her heirs, executors, and administrators; but if such residue should be worth more than 7000*l.*, then I direct the said trustees to pay the said legacies, and to pay my sister Ann Taylor 7000*l.*, and to divide the remainder of my property into four parts, and I direct the said trustees to pay one-fourth part to &c. . . . . And I give the said trustees all necessary powers of sale, and powers to mortgage all or any part of my said property, the more effectually to carry this my will into execution, and their receipt shall be a sufficient discharge to all purchasers and mortgagees." The real estate mentioned in the settlement was never sold, it produces a net income of 290*l.* The personal estate of which Mrs. Fraser died possessed amounted in value to about 11,000*l.* Hugh Fraser, the husband of the deceased, was transported for life in the year 1843, for forgery, and was sent to New South Wales, and nothing has been heard of or about him since the year 1857. Mrs. Fraser in the year 1864 was found a lunatic by inquisition, and continued so until her death. She executed no other will.

Dr. Spinks, Q.C. (*E. Bury* with him), moved the Court to grant probate of the will to Mr. Corrie as one of the executors according to the tenor thereof. The deceased does not constitute a new trust by her will. She uses the word trustees as descriptive only of the persons she wishes to be executors. She directs them to pay certain legacies, which necessarily includes the payment of debts, and she gives them all necessary powers more effectually to carry her will into execution. They are therefore executors according to the tenor thereof. He referred to *Pickering and Towers* v. *Towers* (1), *In the Goods of Manly* (2), *In the Goods of Baylis.* (3)

(1) 2 Lee, Eccl. C. 401.
(2) 3 Sw. & Tr. 56; 31 L. J. (P. M. & A.) 198.
(3) Law Rep. 1 P. & M. 21.

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LORD PENZANCE. This will is the will of a married woman, upon whose marriage, as it appears from the affidavit, a settlement was made, and the bulk of the property, which will pass under this will, was the subject of that settlement. In default of children of the marriage, an event which happened, the trustees were to hold the property upon such trusts, and to and for such intents and purposes, and with, under, and subject to such powers, provisoes, and declarations, as Mrs. Fraser (notwithstanding her coverture, or whether married or sole) by her last will and testament in writing should direct or appoint, and it is in virtue of such power that the will was made. It therefore assumes the common form of an appointment by will in exercise of a power. The will begins in this way: "This is the last will and testament of me, Mary Fraser, of Adelaide Road, Middlesex. I direct the trustees under my marriage settlement to pay, &c." Her intention is apparently to exhaust the trust fund; but not knowing perfectly the precise amount at her disposal, she varies her arrangement according as the residue, after payment of certain legacies, shall exceed 7000*l.* or not. Having directed the trustees under the settlement how to deal with the property vested in them, she concludes by giving them all the necessary powers of sale and mortgage the more effectually to carry her will into execution. It seems to me, then, that the whole of this document is nothing more than an appointment in which the deceased, as she had the power to do, directs how the trust fund shall be distributed. The whole language and substance of the will points to that. All the argument, therefore, which has been based upon the assumption that it is an ordinary will, so that the trustees are to get in the estate and pay the debts and legacies, is wholly inapplicable. Put the case in the strongest light, and suppose the testatrix to have said, "I appoint A. B. my executor," what would he have to do? Nothing at all. As executor he might prove the will, and then his duty would cease. The other duties belong to the trustees of the settlement. Assuming, then, the will to be what I am of opinion it is, a will that affects only the property under the settlement, it seems to me that the trustees alone are the persons who can carry it out, and to do so they must act in the character of trustees under the settlement. It is obvious enough they are not executors nominate,

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but it is said (and Sir E. V. Williams' Executors, pt. i. b 3, ch. ii., p. 230, 6th edition, is cited on this point) that "although no executor be expressly nominated in a will by the word executor, yet if by any word or circumlocution the testator recommend or commit to one or more the charge and office, or the rights which appertain to an executor, it amounts to as much as the ordaining or constituting him or them to be executors." Well, the rights of an executor are to get in the estate to pay the debts due by the deceased, and to discharge the legacies. Are the trustees in this case required to do so? The case cited, *Pickering and Towers* v. *Towers* (1), is not applicable on this point. There the words were "I appoint A. B. and C. D. to receive and pay the contents above mentioned;" and Sir G. Lee held that they were executors, because they could not receive and pay the legacies without collecting in the effects. That is not at all the position of these trustees. As trustees under the settlement they have already got the property, and therefore the case cited is entirely different from the present. The other cases do not relate to wills of married women; but in one of them a decision of Sir C. Cresswell (*In the Goods of James Jones* (2)) is referred to, which is more in point. In that case the whole personal estate was left to a trustee on trust for a specific purpose, and no executor was named. The words were, "I give and bequeath to my dearly beloved brother Thomas Jones all my money, notes of hand, and all securities, together with all other effects my property, in trust to be equally divided by him between himself and all others of my surviving brothers." It is a much stronger case for an executor according to the tenor than the present, because the trusts were created by the will, whilst here they are by the settlement; but Sir C. Cresswell held that all the trustee had to do was to pay over what was vested in him to the particular persons to whose use he held it, and that he had no general power to receive or pay what was due to or from the estate of the deceased. That case is very much more like the present than the others that have been cited. Shortly, then, inasmuch as I regard this will as merely an execution of a power for the distribution of funds already in the hands of the trustees, and that it gives no authority to them to collect the estate and

(1) 2 Lee, Eccl. C. 401. (2) 2 Sw. & Tr. 155; 31 L. J. (P. M. & A.) 199.

pay debts, I cannot consider the applicant as an executor according to the tenor thereof. 1870

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The Court was afterwards moved to make a general grant of all the deceased's estate, on the ground that the husband had been a felon convict and under penal servitude, and the grant so passed accordingly; but the Court refused to treat the trustees as executors according to the tenor, being of opinion that the testatrix, although unrestricted in her power of disposition, had, in the directions given in her will to the trustees, been speaking only of her trust property.

Attorney: *W. H. Lammin.*

YEATMAN *v.* YEATMAN AND RUMMELL. *June* 28.

Dissolution—Desertion before the Adultery complained of—20 & 21 *Vict. c.* 85, *s.* 31.

The Court will not dissolve a marriage on the ground of the wife's adultery when satisfied that, before the date of the adultery complained of, the husband deserted her without reasonable excuse.

THIS was a petition by a husband for a dissolution of marriage. The petition was filed on the 17th of June, 1869, and the adultery was alleged to have been committed since the year 1866. The respondent filed an answer, wherein, after traversing the charge of adultery, she alleged that, prior to the adultery charged, she had instituted a suit for judicial separation from the petitioner on the ground of his desertion; and that he had appeared and pleaded a traverse of the allegation, and that issue having been joined, the cause was heard before the Judge Ordinary, and on the 5th of May, 1868, a decree of judicial separation was pronounced on the ground that the petitioner had deserted her for two years and upwards. The petitioner joined issue on the allegations in the answer, and the cause came on for hearing before the Judge Ordinary on the 17th of June, 1870.

The petitioner appeared in person.

Searle, for the respondent.

Cur. adv. vult.

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THE JUDGE ORDINARY. I think that the petitioner has established the adultery charged in the petition. But the respondent prays that the petition may be dismissed, and alleges that before the adultery charged, she was judicially separated from the petitioner on the ground of his desertion. The parties were married in 1852, and lived together until 1856, and in that year the petitioner took the respondent to Germany, and there separated from her under circumstances which, in the opinion of the Court, constituted desertion. He has never since cohabited with her. In 1858 he instituted a suit for nullity of the marriage on the ground of the insanity of the respondent at the time when it was contracted; but he failed to establish the allegation, and the suit was dismissed. Subsequently, in 1862, and again in 1867, he instituted suits for the dissolution of the marriage on the ground of adultery, in each of which the respondent pleaded desertion; but as the evidence in both cases failed to prove the adultery, it was unnecessary to inquire into the desertion. In 1867 the respondent filed a petition for judicial separation on the ground of desertion, and in 1868 she obtained a decree. (1)

The Court is now asked to exercise the discretion given to it by the 31st section of 20 & 21 Vict. c. 85, and to dissolve the marriage, although the desertion occurred in 1856, and the adultery, on which the suit is founded, occurred in 1866. But I think that on no principle should I be justified in so doing. Nothing is more likely to conduce to adultery than throwing a young wife on the world without the protection of her husband; and desertion without excuse before the adultery complained of is, therefore, in my opinion, a strong reason for withholding a decree. The petition will be dismissed with costs.

Attorney for respondent : *S. Edwards.*

(1) Law Rep. 1 P. & M. 489.

PATTERSON *v.* PATTERSON AND GRAHAM.

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Matrimonial Suit—Damages—Bankruptcy of Co-respondent—Non-payment—Practice.

Damages having been given against a co-respondent, an order was made that the amount should be paid into the registry of the court within a certain time. Before such order had been made, the co-respondent became a bankrupt, and a trustee of his property was appointed. The damages were not paid into the registry, nor could they be proved under the bankruptcy. In order to facilitate the latter step, the Court rescinded its former order and directed that the damages should be paid to the petitioner himself.

THIS was originally a suit instituted by Charles John Patterson, for a dissolution of his marriage with Charlotte Victoria Patterson, by reason of her adultery with the co-respondent, Allen Marden Graham. It was heard on the 9th of February, 1870, before the Judge Ordinary and a special jury, when the jury found by their verdict that the adultery had been proved, and by consent they assessed the damages at 500*l*. The Judge Ordinary thereupon pronounced a decree nisi, and condemned the co-respondent in the costs of the suit. On the 14th of March the co-respondent was adjudicated a bankrupt, and Mr. Thomas Langridge, of Mereworth, Kent, was appointed trustee of the estate, and he accordingly took possession of all the property and securities belonging to the co-respondent, which he still retains. A list of debts, which included the amount of damages and the probable amount of the costs of the suit, was furnished to the trustee by the co-respondent, in order that they might be proved against his estate.

On the 20th of May the petitioner presented to the trustee a proof which included the said amount of damages and costs, but such proof was rejected and disallowed by reason that the decree for dissolving the marriage had not been made absolute, and that it was therefore possible, either by the intervention of the Queen's Proctor, or on a new trial, that the decree nisi might be set aside; that until a decree absolute the petitioner had not a right to the damages, and lastly, that such damages might possibly be the subject of a settlement, in which case the trustee of such settlement would be the proper person to prove for this debt.

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On the 12th of July, an application on behalf of the petitioner was made to the county court of Kent, holden at Maidstone, to reverse this decision of the trustee, and the judge thereof admitted the claim for costs only. No appeal has been entered against this decision of the judge of the county court.

On the 26th of July the Judge Ordinary made an order by which the co-respondent was directed, within seven days after service thereof, to pay into the probate registry the sum of 500*l.*, being the amount of damages assessed by the jury, unless such damages should in the meantime be admitted as a debt payable out of his estate in bankruptcy by the said co-respondent. This order was personally served upon the co-respondent on the 14th of September last, and he at once forwarded it to Messrs. Norton & Sons, the solicitors for Mr. Langridge, the trustee. On the 17th of September, a notice was issued on behalf of the trustee, that creditors who had not proved their debts under the bankruptcy before the 27th of September would be excluded. The co-respondent not having obeyed the order of the Judge Ordinary, dated the 26th of July, 1870,

Dr. Spinks, Q.C., moved that an attachment should issue against him by reason of his non-obedience to such order.

Bayford, on behalf of the co-respondent, took the preliminary objection that, under the rules for carrying into effect the Debtors Act, 1869 (32 & 33 Vict. c. 62), in this court, applications to commit to prison should, in the first instance, be made by summons before the judge.

Dr. Spinks, Q.C. The 5th section of the Debtors Act, 1869, requires that the authority to commit to prison should be exercised by the judge, and by an order made in *open court*. As the damages assessed upon the co-respondent were in the nature of a penalty, a default in their payment comes under the first exception stated in the 4th section, and therefore the co-respondent may be arrested and imprisoned for non-obedience to the order.

THE JUDGE ORDINARY, without hearing counsel for the co-respondent, said that he could not look upon damages as in the nature of a penalty; they had rather the character of retribution or compensation for injury done. He did not think that he could

order an attachment to issue in this case, but he would consider the provisions of the statute.

Cur. adv. vult.

Nov. 22. THE JUDGE ORDINARY. In this case I was desirous of ascertaining in what way I could best carry out the order of this Court with justice to all parties. The petitioner obtained by the verdict of a jury damages against the co-respondent. By 20 & 21 Vict. c. 85, s. 33, after such a verdict has been given the Court shall have power to direct in what manner the damages shall be paid or applied, and they may be given to the petitioner, or applied for the benefit of the children, or as a provision for the maintenance of the wife. The Court has not hitherto ever ordered them to be paid in the first instance to the petitioner, but into the registry of the court, in order that it might deal with them as the circumstances of the case should require. In this case such an order was made, but the co-respondent between the date of the verdict of the jury and the order of the Court, had become a bankrupt. The petitioner attempted to prove for these damages as a debt under the Bankruptcy Act, but the county court judge rejected the proof. The result is, that the petitioner cannot prove for the debt, and the co-respondent cannot be discharged from it. Under these circumstances, I think the petitioner is entitled to the assistance of the Court, and I see no objection to my rescinding my previous order for the payment of the damages into the registry, and I now order that they shall be paid to the petitioner himself.

Proctor for petitioner: *W. G. Jennings.*
Proctor for co-respondent: *C. Waddilove.*

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PATTERSON *v.* PATTERSON AND GRAHAM.

Matrimonial Suit—Decree Absolute—Costs—Proctor's Lien.

The Court cannot, after the time limited by the statute, suspend a decree absolute on the ground that the petitioner has not paid his proctor's taxed costs.

THIS was a suit for dissolution of marriage, by reason of adultery. The questions at issue were tried before the Judge Ordinary and a special jury in February, 1870, when a verdict was found for the petitioner, and the Judge Ordinary made a decree nisi to dissolve the marriage. The petitioner, in person, moved that the decree be made absolute.

Inderwick, for Mr. W. G. Jennings, proctor to the petitioner, applied to the Court to defer making such decree until the petitioner had paid his taxed costs. Mr. Jennings' authority to act for the petitioner was still unrevoked; but being unable to get any payment of his costs, he had declined to take steps to have the decree made absolute. The common law courts will not enable a party to get the result of a judgment against the rights of his attorney.

Cur. adv. vult.

Nov. 29. THE JUDGE ORDINARY. In this case the petitioner in person applied to me to make absolute a decree to dissolve his marriage. On the other hand, I was asked on behalf of the petitioner's proctor to hold my hand, and not to make the decree absolute until his costs had been paid. It occurred to me at the time very forcibly that I should not be justified in withholding the decree on any such grounds; but I took time to enable me to look at the statute. I am satisfied that by the statute I am bound to make the decree absolute unless cause be shewn under 23 & 24 Vict. c. 144, s. 7, for the reasons therein given. I cannot delay it because the petitioner has not paid his proctor's costs. I was referred, as analogous, to the practice of the common law courts, which will not allow a party to stretch out his hand and reap the fruits of a judgment, passing by his attorney's lien for his costs. But there is no analogy between a money demand and a remedy

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of this character. In the former the Court only enforces the attorney's claim against a party who it knows has the means of meeting it out of the proceeds of the judgment obtained; but if I were to suspend the decree until the costs were paid, it might be suspended indefinitely. The decree must be made absolute.

Proctor: *W. G. Jennings.*

BORHAM *v.* BORHAM AND BROWN.

Nov. 22.

Matrimonial Suit—Amendment of Petition—Adultery subsequent to the date of Petition—Practice.

If it be expedient to bring before the Court acts of adultery alleged to have occurred after the date of the original petition, a supplemental petition should be filed for the purpose; and on the preliminary proceedings being completed, the two petitions will be consolidated.

IN this case James Day Borham petitioned the Court for a dissolution of his marriage with his wife, Ann Eliza Borham, by reason of her adultery with the co-respondent Thomas Brown. The adultery was denied. The issues came on for trial before the Judge Ordinary and a common jury in the month of February, 1869; but the jury being unable to agree upon a verdict were discharged. In Hilary Term, 1870, the cause was again entered for trial, and still continues on the list. On the 10th of November, 1870, the petitioner gave notice that he intended to move the Court for leave to amend his petition by inserting therein an allegation of further acts of adultery committed by the respondent with the co-respondent. The proposed amendment consisted of two paragraphs. The first charged adultery generally in the years 1868, 1869, and 1870; and the second on a certain occasion in the early part of the month of May, 1870, at a specified place. In the affidavit to support the application the petitioner stated that the facts in reference to the proposed amendment had only become known to him since the first trial of the cause, namely, in the month of October last.

Inderwick, for the petitioner, moved the Court to allow the amendment to be made in accordance with the notice.

Bayford opposed the motion. The Court has no power to do so,

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as the acts of adultery therein charged took place subsequently to this filing of the petition. By the 27th section of 20 & 21 Vict. c. 85, it is lawful for a husband to present a petition praying that his marriage may be dissolved on the ground that his wife has *since the celebration* thereof been guilty of adultery. The only acts of adultery that can be brought to the attention of the Court on the hearing of any petition are such as have occurred between the dates of the marriage and such petition. In the 31st section which relates to the answer, the phrase is changed, the Court shall not pronounce a decree if it shall find that the petitioner has *during the marriage* been guilty of adultery.

Dr. Swabey for the co-respondent.

Inderwick referred to the constant practice by which such amendments have been allowed. He cited *Boddy* v. *Boddy and Grover*. (1)

THE JUDGE ORDINARY. No doubt, so far as convenience and justice are concerned, I should be inclined to allow the amendment, but the question is whether technically I have the power to grant the motion. According to all ordinary legal and technical principles if there is to be a decree on a petition, it ought to be founded on acts done before the date of the petition. I will look into the papers connected with the case of *Boddy* v. *Boddy and Grover* (1), and consider what order I ought to make.

Cur. adv. vult.

NOV. 22. THE JUDGE ORDINARY. This was an application to amend a petition by inserting charges of adultery, which it is alleged took place after the petition was filed. This was opposed on the suggestion that great confusion must arise if such an amendment be permitted. The case of *Boddy* v. *Boddy and Grover* (1) was referred to, and I therefore sent for the papers in that case. The Judge Ordinary (Sir C. Cresswell) did in that case, after several adjournments by reason of the insufficiency of the affidavit, make an order permitting charges of adultery to be added to the petition, such adultery having occurred after the petition had been filed. Relying on that case, I think I ought to follow the same course, and allow the petition to be amended, if after what I am about to

(1) 30 L. J. (P. M. & A.) 23.

state the petitioner should be advised to press his application. But looking at the Act of Parliament, I have a very great doubt whether the Court of Appeal would sanction such a proceeding. The 20 & 21 Vict. c. 85, s. 27, says it shall be lawful for a husband to present a petition praying his marriage may be dissolved on the ground that his wife has *since the celebration thereof* been guilty of adultery; and the 30th section says, that in case the Court, on the evidence in relation to any such petition shall not be satisfied that the *alleged* adultery has been committed it shall dismiss the petition. I think, therefore, that acts of adultery subsequent to the date of the petition cannot properly be taken into consideration at the hearing of the petition itself; and that if a judgment for a dissolution be founded on such subsequent acts, the whole proceeding would be held by a court of appeal to be erroneous. I am willing, however, if the petitioner desires it, to allow the amendment to be made, or he may file a fresh petition. If he determines to commence a new proceeding the question of costs will be reserved, and I will take care that the respondent and co-respondent are not prejudiced in that respect.

Nov. 29. On the application of *Inderwick*, leave was given to the petitioner to file a supplemental petition setting out the acts of adultery alleged to have been committed subsequently to the filing the original petition, and to the respondent and co-respondent to answer thereto, on the understanding that the two petitions should then be consolidated. The original petition to keep its place on the list for hearing, and the directions as to the mode of trial already given to hold good for both petitions when consolidated.

Attorneys for petitioner: *Vizard, Crowder, and Anstie.*
Attorneys for respondent: *Sharp & Ullithorne.*
Attorneys for co-respondent: *Jones & Starling.*

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Dec. 20.

WEST *v.* WEST AND PARKER.

Costs of Co-Respondent—Claim for Damages—Adultery not Proved—20 & 21 Vict. c. 85, ss. 33, 34, 51.

The insertion in a petition of a claim for damages does not deprive the Court of the power to make such order as to costs as may seem just, given by the 51st section of 20 & 21 Vict. c. 85.

On the trial of an issue of adultery the alleged adulterer was called as a witness, and simply denied the charge without entering into any details or offering any explanation of his conduct. The jury were unable to agree upon their verdict, and the issue was tried a second time. On the second trial the alleged adulterer was again examined, and, besides denying the adultery, entered into full details and explained his conduct. The jury found that he was not guilty of the charge. The Court refused to condemn the petitioner in his costs on the ground that by his suspicious conduct and by his reticence on the first trial he had contributed to put the petitioner to the expense of a second trial.

THIS was a petition by a husband for a dissolution of marriage, and claiming damages. The respondent and the co-respondent denied the charge of adultery, and the respondent made counter charges of adultery and of cruelty against the petitioner. A cross petition had been presented by the respondent, and the petition and the answer of the husband thereto raised the same issues as those raised in the present suit. The issues in the suit instituted by the respondent were tried before the Judge Ordinary by a common jury in July, 1869, before the passing of the Evidence Further Amendment Act, by which the evidence of the parties was made admissible. The jury found—1. That the petitioner had been guilty of adultery with some person unknown; 2. That the petitioner had been guilty of cruelty to his wife; 3. That the petitioner had not been guilty of adultery with a woman named Starling. They were unable to agree upon the question whether the respondent and co-respondent were guilty of adultery, and were discharged on that issue. The verdict was set aside, and a new trial of all the issues ordered by the full Court, and the two suits were afterwards consolidated by order of the Judge Ordinary. The cause was heard before the Judge Ordinary and a special jury on the 30th of November, and the 1st, 2nd, 3rd, 7th, and 8th of December, 1870, and the jury found—1. That the respondent and co-respondent were not guilty of adultery; 2. That the petitioner

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was not guilty of adultery with Starling; 3. That the petitioner was guilty of adultery with some woman unknown; 4. That the petitioner was guilty of cruelty. The Court, thereupon, at the instance of the respondent, made a decree nisi on the ground of the adultery, coupled with cruelty, of the petitioner.

On the first trial the co-respondent was called as a witness, and admitted that he was on intimate terms with the petitioner, and that he paid frequent visits to Mrs. West during her husband's absence, and frequently walked and drove out with her, but he gave no explanation of his conduct, but merely said in answer to the question, whether he was guilty of adultery, that he was not. On the second trial his explanation was that he was a suitor to Mrs. West's sister, and that the visits were paid not to Mrs. West but to her sister; and it was also proved for the first time on the second trial that he was cognizant of all the proceedings in the first suit, and had introduced Mrs. West to his own solicitor, and assisted in getting up her case.

Dec. 20. *Dr. Spinks, Q.C.* (*Finlay* with him), moved that the petitioner might be condemned in the costs of the co-respondent Parker.

Searle, for the petitioner, cited *Carstairs* v. *Carstairs and Dickenson.* (1) In this case the imprudence of Parker was such that he ought to pay his own costs. The petitioner was certainly justified in drawing the conclusion from the evidence before him, coupled with the absence of any explanation or contradiction by Parker, that Parker was guilty; and there was no excuse for Parker not availing himself of the opportunity offered him upon the first trial, of rebutting the charge which had been made against him.

Dr. Spinks. It must now be taken that the petitioner is guilty of adultery and cruelty, and that the respondent and co-respondent are innocent. The petition ought, therefore, never to have been presented, and the claim for damages was an improper one. The 33rd section of 20 & 21 Vict. c. 85 enacts that a claim for damages shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations as an action for crim. con. in a court of common law. In a

(1) 3 Sw. & Tr. 538; 33 L. J. (P. M. & A.) 170.

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court of common law an unsuccessful plaintiff in an action for crim. con. would, as a matter of course, have paid the costs of the defendant. Therefore the Court has no power to deprive a co-respondent of his costs in a case where damages are claimed and the adultery is not established. The 34th section seems to bear out this construction, for it could hardly be necessary expressly to authorize the Court to condemn the adulterer in costs if the general power as to costs contained in the 51st section be considered to extend to a petition against an adulterer containing a claim for damages. The costs of a petition in which damages are claimed must be governed by the 33rd and not by the 51st section.

THE JUDGE ORDINARY. I do not at all coincide with the argument just addressed to the Court as to the effect of the statute. The 51st section very clearly gives the Court a discretion to make such order as to costs as may seem just to it on the hearing of any suit, proceeding, or petition under this Act. The words of the section clearly include the case of a petition limited to a claim for damages only, presented under the 33rd section. But it is argued that the effect of the 34th section is to place a petition containing a claim for damages on a different footing as to costs from any other petition. I think the meaning of that section is very plain. It gives the Court power, in cases where the adultery is established, to condemn the adulterer in the costs, not only of proving the adultery against him, but in the costs of the whole of the proceedings rendered necessary by his adultery. No doubt the 33rd section says, in general terms, that claims for damages shall be heard and tried on the same principles, in the same manner, and subject to the same or like rules and regulations as actions from criminal conversation in courts of common law; but it goes on to enact that "all the enactments herein contained, with reference to the hearing and decision of petitions to the Court, shall, so far as may be necessary, be deemed applicable to the hearing and decision of petitions presented under this enactment." Those words clearly bring claims for damages within the 51st section. There is, therefore, in my opinion, no distinction as to costs between a petition containing a claim for damages against an adulterer and a petition containing no such claim.

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Now comes the question whether the Court ought to exercise its discretion by condemning the petitioner in the costs of the co-respondent. In considering the conduct of the co-respondent towards the respondent the Court is bound, I think, to take the finding of the jury as conclusive; and the jury having fairly and fully tried the case, and deliberated on the evidence, have found that the respondent and the co-respondent are innocent. It became very evident, in the course of the case, that one main question for the consideration of the jury was whether there was any substantial reason consistent with innocence for the co-respondent's numerous visits to the petitioner's farm; and the answer to that question depended on whether the jury thought he was paying attention to the respondent or to her sister. The jury were of opinion that he was paying attention to the sister, and acquitted him. But on looking at the whole history of the case, I am obliged to come to the conclusion that he ought not to have an order for costs. On the second trial we became acquainted, for the first time, with the fact that it was the co-respondent himself who took the respondent to the solicitor who undertook her case; and there is no doubt that the co-respondent must have been cognizant of all the proceedings in the suit which she instituted. That was a suit by the wife against the husband, but the question of her adultery with Parker was raised in it. He must have known all that was going on, and yet he did not come forward and tell the Court what he told it on the last trial. The jury were unable to come to any conclusion as to the charge of adultery against the respondent and Parker, and the petitioner was therefore put to the expense of a second trial. It appears to me that by merely denying the adultery with which he was charged on the first trial, without going on to give the evidence in explanation of his conduct which he gave on the second trial, the co-respondent contributed to bring about the necessity for a second trial. Then his conduct, however innocent in intention, was very suspicious in appearance. His visits were clandestine when they should have been open. On the whole he has done much to cause this litigation, and must pay his own costs of it.

Attorney for petitioner: *H. Parry.*
Attorneys for respondent: *Denton & Co.*
Attorneys for co-respondent: *Whyte & Co.*

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Jan. 17.

SNOWDON *v.* SNOWDON.

Matrimonial Suit—Alimony—No answer of Husband—Rule 84*—Practice.*

In a matrimonial suit the wife filed a petition for alimony, to which the respondent did not answer. Under the 84th rule (Rules and Regulations, 1866) the Court made a peremptory order upon the respondent to file an answer to the petition for alimony within a week.

THIS was a suit for dissolution of marriage, brought by Hannah Snowdon against her husband, John Pringle Snowdon, by reason of his adultery coupled with cruelty. On the 5th of November, 1870, Mrs. Snowdon filed a petition for alimony, pendente lite, in which she alleged that her husband carried on a business as a surgeon in High West Street, Gateshead, in the county of Durham, and derived an income therefrom of 300*l.* per annum. To this petition, which was personally served upon him, Mr. Snowdon made no answer.

Inderwick, for Mrs. Snowdon, applied to the Court to order Mr. Snowdon to file an answer within a week. The 84th rule distinctly requires that the husband *shall,* within eight days after the filing and delivering of a petition for alimony, file his answer thereto on oath. There is no doubt that Mr. Snowdon has an income, but it may be impossible for the petitioner to prove its amount.

THE JUDGE ORDINARY thought the course proposed was the right one, and made the order accordingly.

Attorney for petitioner: *F. C. Welford.*

COX *v.* COX, READE, AND TOBIN. 1871

Suit for Dissolution—Special Jury—Two Co-respondents—Separate Trials—Practice. *Jan.* 24.

A petition alleged adultery between a respondent and co-respondent A. A. appeared to the citation served upon him, but did not file any answer. The petition was subsequently amended by alleging adultery with co-respondent B. B. appeared and denied the charge. The questions at issue were directed to be tried before the Court and a special jury. On the application of B., and on the condition that he should pay any extra costs to which the petitioner might be put by the order, the Court ordered that the questions at issue against B. should be tried separately from and before those against A.

IN this case Henry Cox, on the 7th of June, 1870, petitioned the Court for a dissolution of his marriage with Fanny Adelaide Cox, by reason of her adultery with George William Reade. The respondent appeared, and filed an answer to the petition denying the adultery. Mr. Reade appeared, but did not file any answer. On the 8th of August, 1870, with the permission of the Court, the petition was amended by the addition of charges of adultery with James Aspinall Tobin. Mr. Tobin appeared, and denied the adultery so charged against him, and the respondent also denied the additional charges. On the 8th of November, 1870, the questions at issue were directed to be tried before the Court and a special jury.

Dr. Swabey moved the Court, on behalf of Mr. Tobin, to order that the trial of the issues relating to the adultery alleged against the respondent with him, and against him with the respondent, shall be taken separately and apart from the issues relating to the adultery alleged against the respondent with the co-respondent, George William Reade, and that they shall be tried first. As the co-respondent Reade has not answered, the case will be decided against him in default; and it is obvious that if the evidence against the two co-respondents is mixed up together, Mr. Tobin will be very much prejudiced in laying his case before a jury. He is quite willing to pay any extra costs to which the petitioner may be put by having the issues against the two co-respondents separated: *Barnes* v. *Barnes & Beaumont.* (1)

(1) Law Rep. 1 P. & M. 572.

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Inderwick appeared for the petitioner.
Hawkins, Q.C., and *Searle*, appeared for the respondent.

THE JUDGE ORDINARY. I think it is right that the co-respondent Tobin should have the cause tried, so far as it relates to him, before the issues are tried against the co-respondent Reade, on his undertaking to pay any costs to which the petitioner may be put by reason of such additional trial.

On the 9th of February, on the motion of *Sir J. Karslake, Q.C.* (*Dr. Spinks, Q.C.*, and *Inderwick*, with him), for the petitioner, the Judge Ordinary ordered that the charges of adultery against Mr. Tobin should be struck out of the petition on the payment of his costs.

Attorneys for petitioner: *Gregory & Co.*
Attorneys for the co-respondent Tobin: *Walker & Sons.*

Referred to. BARKER *v.* BARKER. [1950] 1 All E.R. 812.

Jan. 17.

MILNE *v.* MILNE AND FOWLER.

Suit for Dissolution—Decree nisi—Respondent and Co-respondent condemned in Costs.

In a suit for dissolution of marriage by reason of adultery, both the respondent and co-respondent appeared and pleaded. At the trial no evidence was offered in support of any of their pleas, and a verdict having been returned in favour of the petitioner, with damages, a decree nisi was made. The respondent had a large separate income. The Court ordered her to pay the costs of the proceedings, and the co-respondent to pay such costs as had been incurred by the issues he had raised on his answer.

ALLEN MILNE petitioned the Court for a dissolution of his marriage by reason of the adultery of his wife, Ellen Milne, with the co-respondent, Robinson Fowler. The respondent, in her answer, pleaded a denial of the charge; condonation; connivance; cruelty, and wilful neglect. The co-respondent pleaded a denial, and condonation. The questions at issue were brought before the Judge Ordinary and a special jury, on the 8th of December, 1870, when the respondent withdrew her pleas, and the co-respondent offered no defence. A verdict was found for the petitioner upon

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all the questions at issue, and, by consent, damages were assessed at 1500*l.* A decree nisi was made, and the question of costs was reserved.

It appeared from affidavits that there were six children of the marriage, of whom five were dependent upon the petitioner, who had but a moderate income. The respondent had a separate estate producing to her an income of 4100*l.* per annum. It arose from certain freehold estates, ground rents and hereditaments, which had been devised by her father to trustees in trust to pay the income to her, for her separate use, without power of anticipation, for her life, and with the further restriction, unless or until she, being for the time being discovert, should do or suffer any act or thing, or any event should happen whereby, notwithstanding the restriction on anticipation hereinbefore imposed, the said income or any part thereof should, or but for the trust or provision next hereinafter contained would, either voluntarily or involuntarily, be aliened or incumbered, or be receivable otherwise than by herself personally, in which case the annual income of such hereditaments were no longer to be paid to her, but to be applied in favour of the respondent's sister and her children in such manner as the trustees might think proper. The co-respondent was a man of small means. The facts proved on the trial sufficiently appear in the judgment of the Court.

Hawkins, Q.C. (with him *Dr. Spinks, Q.C.*, *West, Q.C.*, and *Pritchard*), now moved the Court to condemn the respondent and co-respondent in the costs of the proceedings. If an order is made against the co-respondent only, it is probable that the petitioner will never recover the costs at all; and certainly will not recover them so far as they relate to the charges made by the respondent, which were withdrawn at the hearing. On the other hand, the respondent has a large independent fortune, and ought to be compelled to reimburse the expenses her husband has been put to by her misconduct. The Court is fully authorized to make such an order by 20 & 21 Vict. c. 85, s. 51, and it has already done so in suits for restitution of conjugal rights: *Giacometti* v. *Giacometti* (1); *Miller* v. *Miller*. (2)

Sir J. Karslake, Q.C. (*G. Browne* with him), for the respondent,

(1) Michaelmas Term, 1870. (2) Ante, p. 13.

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opposed the motion. This is the first instance in which the Court has been asked to condemn a wife in her husband's costs in a suit for dissolution of marriage. If the 34th section be read with the 51st, it is evident that the legislature intended that the co-respondent should bear these costs. In the present case, if the Court makes the order prayed, the debt of the husband will become a charge on the wife's separate property, and under the restrictions of her father's will she may then be deprived of her whole income. At any rate the Court cannot make an order upon her to pay the whole costs.

Garth, Q.C., and *E. Ashley*, appeared for the co-respondent.

LORD PENZANCE. It is quite clear I have the power to make this order, and the only question is whether it is just I should do so. In this suit there were three parties, the petitioner, the respondent, and the co-respondent. The two latter pleaded separately, issue was joined, and the cause came on for trial, and according to the daily practice the jury were required to state by their verdict whether the respondent had committed adultery with the co-respondent, and also whether the co-respondent had committed adultery with the respondent. The questions being put separately by reason that there might be evidence which would affect the wife, and not be admissible against the co-respondent, and vice versâ. The parties appeared at the trial, but did not contest the evidence produced by the petitioner; a verdict was given in his favour, and a certain sum by way of damages was assessed against the co-respondent. The first question is whether I shall now condemn the co-respondent in the costs of the issues found against him, and that I certainly shall do. As regards the respondent, the only reason why a wife as respondent is relieved from the payment of costs is, that in the majority of cases the wife has no property. The law assumes that on her marriage all her property passes to her husband, and in a very large number of cases the wife not only does not pay costs, but litigates at the expense of her husband. But this all depends upon the assumption that she has not got any property. Here it is exactly the other way. The wife has a large separate income, and the husband but moderate means, and there can be no reason

why a wife with large property should not be made to pay the costs like any other suitor. It is improper to apply a rule to a case, in which the reason of such rule entirely fails. As a general principle, therefore, a wife who has property should be liable for costs. I say liable, for I do not mean that in every case I should condemn her in the costs, because that would be to affirm the proposition that she would be liable in cases in which blame might attach to her husband for her misconduct. It is therefore in the discretion of the Court to exercise this power, and it becomes a question whether I should do so in this case. I am at a loss to discover any cause of blame in the conduct of the husband. She ran off with the co-respondent, her husband forgave her and took her back. Shortly afterwards she again left her home with the co-respondent, and has continued to live with him ever since. The husband is entirely free from blame, the wife is without excuse. I shall therefore condemn her in the costs, and it will answer all purposes for to-day if I condemn her in such costs as arise out of her pleas and the issues found against her. If after taxation she has to complain of any special item allowed against her she may apply to me in chambers. It has been said that, if I read the 34th and 51st sections together, I should not be justified in condemning the respondent in costs, but I take it the 34th section was passed for a definite object. Whereas the 51st section gives the Court a general power to make such orders as to costs as to it may seem just, the 34th applies only to the case of a co-respondent, and enables the Court, if it shall think right, to order him to pay the whole costs of the proceedings. Again it has been suggested that if I make this order it will be a charge upon the respondent's separate property, and that by her father's will, if anything be done by her voluntarily or involuntarily to incumber it, she may lose it altogether. At present I merely make an order for costs. At the proper time, when I know the amount of costs to be paid, I will consider on what fund they can be properly charged.

Proctors for petitioner: *Pritchard & Sons.*

Attorneys for respondent and co-respondent: *Pyke, Irving, & Pyke.*

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Jan. 17.

IN THE GOODS OF JOHN WOODWARD.

Will—First lines cut and torn off—Revocation.

On the death of deceased a will was found in an iron chest, in which the deceased kept important papers. It had been written on the first sides of seven sheets of brief-paper, and had been signed by the deceased and witnesses on each sheet and at the end. The first seven or eight lines had been cut and torn off, but in other respects the will was complete:—

Held, that from the mere cutting or tearing off the beginning of the will without other circumstances, it could not be inferred that the deceased intended to revoke the whole will, and that it must be admitted to probate in its incomplete state.

JOHN WOODWARD, late of Needham Market, Suffolk, grocer and draper, died on the 5th of November, 1870, having made and duly executed his will, dated the 18th of October, 1828, in which he named his wife, Sarah Abigail Woodward, and Robert Henry Orman (since deceased) executors. The will was written on the first sides of seven sheets of brief-paper, and was signed by the testator and the witnesses on each sheet, and at the end of the will. It was found on the death of the testator in an iron chest in his counting-house, of which he kept the key, and in which he placed all papers of importance. It was not enclosed in an envelope, and the first seven or eight lines at the beginning of it were partly cut and partly torn off, so that it commenced "ward Pownall, and I declare that this devise shall be taken in lieu of all right and title to dower which she might have in any other part of my property, &c." This will had been prepared by Mr. Edward Pownall, who was also one of the attesting witnesses to it, but Mr. Pownall left Needham Market shortly after the date of the will, and never afterwards acted as solicitor for the deceased. He died in 1868. No information could be obtained as to the effect of the portion of the will torn off, and no draft of that will or any other will was forthcoming, although the deceased had often expressed an intention to make a new will.

Dr. Swabey moved for probate of this will. The deceased must be presumed to have removed the first lines of the will himself but, as he carefully preserved the paper until his death, it would seem that he did so, not with the intention of destroying the

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entirety of the will, but to effect a revocation pro tanto only, and that the law allows.

LORD PENZANCE. I think in this case probate ought to go. On the death of the testator a will was found in his custody, and duly executed; and the question is, whether it was ever revoked. The only evidence of the matter is contained in the fact that when found seven or eight lines at the beginning of the document had been partially cut and partially torn off. The point for my decision is, whether in that state of things, without any other circumstances tending to shew that the testator intended to revoke his will, a revocation has been effected. By 20th section (1 Vict. c. 26) no will or codicil, or any part thereof, shall be revoked otherwise than by marriage, or by another will, codicil, or writing duly executed, or by the burning, tearing, or otherwise destroying the same by the testator or by some person in his presence and by his direction, with the intention of revoking the same. Here the will was duly executed, and there is no evidence of an intention to revoke it, unless such an intention can be gathered from the fact that the first lines of the will were destroyed. The case of *Clarke* v. *Scripps* (1) seems to be most in point. That was a very careful judgment of Sir J. Dodson, in which he investigated all the previous decisions, and I quite coincide in the reasons he gives for his judgment. He says: "Out of the mutilated state of this instrument arises the question, not very easy of solution, namely, whether the will is to be considered revoked in toto, or in part only. Upon this enactment (1 Vict. c. 26, s. 20) it is obvious, first, that a part only of a will may be revoked in the manner described; in other words, that the whole will is not necessarily revoked by the destruction of a part; nevertheless, I do not by any means intend to say that the destruction of a part may not under certain circumstances operate as a revocation of the entire will. Secondly, it is to be observed that the burning, tearing, or otherwise destroying the instrument must be done with the *intention* to revoke. It is not the mere manual operation of tearing the instrument, or the act of throwing it into a fire, or of destroying it by other means, which will satisfy the requisites of the law; the

(1) 2 Rob. Ecc. 563.

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act must be accompanied with the intention to revoke; there must be the animus as well as the act, both must concur in order to constitute a legal revocation. It is the animus also which must govern the extent and measure of operation to be attributed to the act, and determine whether the act shall effect the revocation of the whole instrument, or only of some and what portion thereof. Now the intention of a testator to revoke wholly or in part may, I conceive, be proved, first, by evidence of the expressed declaration of a testator, especially if such declaration was contemporaneous with the act. . . . Secondly, the intention may, in the absence of any express declaration, be inferred from the nature and extent of the act done by a testator, i. e., it may be inferred from the state and condition to which the instrument has been reduced by the act. From the face of the paper itself it may be inferred, either he did intend to destroy it altogether or did not." I think that is a very good way of regarding the question, for it is obvious that the mutilation may be of such a part and in such a manner as to afford evidence that the deceased did not intend the document any longer to operate as his will. If, for instance, he should tear off the seal or his own signature? Applying the reasoning to the present case, I have come to the conclusion that, in the absence of any evidence to the contrary, the mere cutting off eight lines at the beginning of the document does not shew an intention to revoke the whole will. It may be said that the object of tearing off the first part was to destroy the statement that it was the last will and testament of the deceased, which is a material averment, but the force of that observation depends very much, if not entirely, upon the consideration whether there was anything else of moment or importance in that part of the will destroyed, which the testator might have wished to revoke. It is probable in this case that there was. It seems probable that the part torn off did contain something besides the mere statement that the document was the last will and testament of the deceased, and it might very well have been that the deceased tore it off in order to get rid of that. I consider, under these circumstances, that the will is not revoked, and must be admitted to probate.

Proctors: *Wadeson & French.*

CAMPBELL AND OTHERS *v.* LUCY AND CAMPBELL. 1871 *Feb.* 1, 14.

Will and Codicils—Testator domiciled in Scotland—Will executed in accordance with the provisions of 1 *Vict. c.* 26—*Not the Codicils—Will and Codicils valid by the Law of Scotland—Real Estate in England—Citation of Heir-at-law—*20 *& 21 Vict. c.* 77, *ss.* 61, 62—*Affidavit.*

The provisions of 20 & 21 Vict. c. 77, which authorize the citing of the heir-at-law or persons interested in the real estate, when contentious proceedings arise as to the validity of a will, and by which the probate of a will granted after such litigation is to enure to the benefit of all persons interested in the real estate affected by the will, are not applicable to wills executed before the Wills Act, or to wills which in whole or in part have been executed not in accordance with the requirements of the Wills Act.

The affidavit upon which an application to cite the persons interested in the real estate affected by a will in dispute is based, must state not only that it disposes of real estate, but that it was executed according to the law of England, and at a date since the Wills Act came into operation.

ALEXANDER CAMERON CAMPBELL, of Inveraw, Argyleshire, died at Leamington, Warwickshire, on the 5th of January, 1869. He left a will, dated the 25th of April, 1866, and executed in the presence of two witnesses. By it he disposed of his whole real and personal estate wheresoever situated, and he appointed his wife Christina Cameron Campbell, Daniel Stewart MacLaren, and Donald Beith, executors, trustees, and guardians of his minor children. He also left two papers, holograph, but not executed in accordance with the provisions of the 1 Vict. c. 26, dated respectively the 27th of September, 1866, and the 1st of October, 1866. The testator at the time of his death being a domiciled Scotchman, these papers, as a will and two codicils, were admitted to confirmation by the Commissary of Argyleshire, at Inverary, on the 12th of May, 1869, and the seal of the English Court of Probate was subsequently attached to such confirmation. The testator having some real property at Leamington, and doubts having arisen how far the testamentary papers recognized in Scotland affected such property, the executors cited the co-heiresses at law of the deceased, namely, Mrs. Christina Lucy, Louisa Campbell and Jane Campbell, his daughters, to see such papers propounded. Jane Campbell alone appeared, by her guardian Henry Spencer Lucy, she being under age. The executors propounded the will and codicils

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as duly executed according to the law of Scotland, and further that the will was duly executed according to the law of England. The defendant, Miss Jane Campbell, pleaded thereto that the codicils were not duly executed according to the law of Scotland, and she gave the usual notice that she only intended to cross-examine the witnesses produced by the plaintiffs. The cause was heard before Lord Penzance on the 1st of February, when formal proof was given of the execution of the will, the handwriting of the deceased, and the law of Scotland.

Inderwick appeared for the executors.
Dr. Tristram for Miss Jane Campbell.

Feb. 14. LORD PENZANCE. The present application is founded upon an entire misconception of the provisions of the Probate Act in relation to the effect of a probate upon real property. The applicants ask for probate of a Scotch will, and are entitled to it. The deceased was a domiciled Scotchman, and the will has been proved to have been executed in a manner conformable to Scotch law. There are two codicils to which the same remark applies, and they must form part of the probate. So far there is no difficulty. But the applicants want something more. They desire to obtain from the Court a decree in some form which shall bind the real estate in England. Now, the will was executed in a manner which would be sufficient for the devise of real property in this country, but the codicils were neither of them so executed. So far, therefore, as real estate in this country is concerned, the testamentary dispositions of the testator would be confined to the will itself, unaltered by the codicils; while, so far as regards personal estate, the testator's will must be held to consist of both will and codicils. There is, therefore, one will applicable to the realty, and another and different one applicable to the personalty. In such a case I am very clearly of opinion that the legislature did not intend to confer upon this Court any jurisdiction whatever to discuss or determine the validity of the will in respect of realty. It is impossible to read ss. 61, 62, 63, 64 (20 & 21 Vict. c. 77), without perceiving that the legislature, in those provisions, has throughout assumed that the same will, which regulates the disposition of the personalty, will regulate also that of the realty.

It has accordingly provided that one inquiry upon the validity of the will shall suffice for both, and that the will once proved in respect of the personalty, the probate shall "enure" (that is the word used in s. 62) for the benefit of all persons interested in the real estate affected by such will. Such a provision obviously assumes that the questions which touch the validity of the will regarding realty are the same as those which would determine the validity of the will regarding personalty. For if there were any difference between them, it would be absurd to enact that the probate of the one should be conclusive evidence of the validity of the other. The Court can only, therefore, give a reasonable interpretation to those provisions by holding that they apply exclusively to cases where the whole will has been executed under and in accordance with the requirements of the Wills Act. Wills made before the Wills Act, and wills executed abroad, according to the laws of foreign countries, do not require for their validity the same formularies in respect both of real and personal estate. They are not the subject therefore of one and the same inquiry for their validity in both aspects, and the persons interested in the realty ought not to be cited when such wills are offered for proof in this court. In this case the citation has improvidently issued, and must, together with the appearance to it, be expunged from the proceedings. To guard against error in future it will be necessary that the affidavit upon which the application for leave to cite those interested in the realty is based, should state not only that the will disposes of real estate, but that it was executed according to the law of England, and at a date since the Wills Act came into operation.

Attorneys for plaintiffs: *Barnes & Bernard.*
Attorneys for defendant: *Bower & Cotton.*

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Feb. 9.

IN THE GOODS OF SARAH STAINTON.

Administration to a Mother—Nominee of the Majority of Next of Kin—Eldest Son Trustee under Father's Will—Property to be administered part of Father's Estate—Practice.

A deceased left a will, in which he made his wife executrix, and gave her a life interest in the whole of his property; on her death he directed it should be sold, and the proceeds divided amongst his children; and he appointed his eldest son and another person, trustees, to carry such division into effect. The widow took probate of the will, and subsequently sold the property of her husband for 600*l.*; and with that sum, and 130*l.* of her own moneys, purchased two leasehold houses. On her death, the Court granted administration of her effects to the eldest son, the trustee named in their father's will, in preference to the nominee of the other next of kin, five in number.

JOSEPH STAINTON, of the Jolly Bacchus, in Birmingham, licensed victualler, died on the 18th of April, 1842. He made a will, in which he nominated his wife, Sarah Stainton, sole executrix, and left her a life interest in the whole of his property, including the lease of the Jolly Bacchus, the stock in trade, goods, chattels, and effects therein. On her death, he ordered the residue of the property to be sold, and the proceeds thereof to be divided between his children in equal shares, except that the two youngest were to receive each 20*l.* more than the others, and he appointed Mr. Butcher (since deceased), and his eldest son, James Stainton, trustees, to carry the same into effect after the death of his wife. Mrs. Stainton took probate of this will in May, 1842, and in 1847 she sold the lease and business of the Jolly Bacchus for 600*l.* With this money, and 130*l.* of her own, she purchased, in her own name, two leasehold houses in Glebe Street and Cregoe Street, Birmingham; and in 1862 she mortgaged the house in Glebe Street for 200*l.* In 1867, the mortgagee having called in her money, a fresh mortgage on both houses was effected for 300*l.* 250*l.* was set apart to pay off the first mortgage and expenses, and 50*l.* thereof was handed over to Mrs. Stainton. Mrs. Stainton died on the 25th of July, 1870, leaving six children, her next of kin, James Stainton, Joseph Stainton, John Stainton, Samuel Stainton, Ann Stokes, and Sarah Bird; and the only property to be administered was the above-mentioned leasehold houses.

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IN THE GOODS OF SARAH STAINTON.

Dr. Middleton moved the Court to decree administration to James Stainton. The property, although nominally belonging to Sarah Stainton, was mainly purchased with funds derived by the sale of Joseph Stainton's estate. James Stainton, as the eldest son and trustee of the father's property, has a greater interest therefore in the property of the deceased, and a better title to administration, than the nominee of his brothers and sisters.

Inderwick, for the other next of kin, applied for administration to be granted jointly to James Stainton and John Stainton, or to John Stainton alone. John Stainton is the nominee of five-sixths the interests in the mother's property, and the Court almost invariably gives the preference to the next of kin, who represents the majority of interests. Moreover, it is sworn that the extra 50*l.*, raised on the second mortgage, was given to James Stainton as a loan, which he has not repaid. He is therefore a debtor to his mother's estate.

LORD PENZANCE. I think the grant ought to issue to James Stainton, the eldest son. It is true that if the majority of interests desire that the administration should be placed in other hands, the Court, in its discretion, will usually grant it to the nominee of such majority. That is the general rule. In this case, however, the larger portion of the property to be administered is actually part of the estate of Joseph Stainton, the father; and James Stainton is not only the eldest son, but the surviving trustee named in the father's will. As regards the charges made against James Stainton, I think the proof fails on the affidavits; and, therefore, administration may issue to him, but he must give justifying security. I shall make no order as to costs.

Attorneys for James Stainton: *Deere & Bourne.*
Attorney for the other next of kin: *W. H. Reece.*

1871
Jan. 31.

IN THE GOODS OF CHARLES BIRT.

Will—Written on First Side of a Half-sheet of Paper—Bequest on Back—Incorporation.

The deceased, in his will, which was written by himself on the first side of a half-sheet of paper, gave his property to his wife for life, and then, intending to dispose of certain freehold cottages on the death of his wife, commenced a sentence which he left incomplete. After the incomplete sentence was an asterisk, and the words "see over." The will, which covered the whole of the first side, was executed at the bottom of that side, and at the top of the second side was another asterisk, and a devise of the cottages to his daughter. This bequest was written before the will was executed.

The Court held that the words on the second side were in the nature of an interlineation, and formed part of the will.

CHARLES BIRT, of Cannonbury Villas, Islington, died on the 21st of October, 1870, leaving Elizabeth Birt, his widow, and Charles John Birt, his heir-at-law, together with Ambrose William Birt and Eleanor Elizabeth Cuthbertson, his only next of kin. On the 15th of November, 1867, he wrote out and executed a will to the following effect:—

"On this fifteenth day of November, 1867, I, Charles Birt, of 13, Cannonbury Villas, now numbered as 251, Essex Road, in the parish of St. Mary, Islington, in the section of the said parish called Cannonbury Ward, do declare that the following statement and wish is, that on my decease that all property or properties, and all moneys or securities of moneys, that I have had on mortgage, or any shares of any governmental character, or loan, or cash that I may have deposited at, or otherwise . . . at interest, or otherwise, or any way or manner . . . that the same, all and entirely, be vested in, and shall belong to, my wife, Elizabeth Birt, for her own sole use and benefit during the term of her natural C. B. life, and to be under her own controul, with the full understanding that the freehold cottages situate and being at Finchley, in the county of Middlesex, called by name and known as Nos. 1, 2, 3, and 4, Arlington Cottages, * see over C. B. all the foregoing * see over I hereby declare to be my last will and testament—and herewith sign my name below in the presence of two witnesses, Mrs. Coulson

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IN THE GOODS OF BIRT.

and Miss Pottle, who afterwards affix their signatures attesting the same, and in the presence of each other."

This will occupied the *first* side of a half-sheet of paper entirely, and was executed at the bottom of the first side. At the top of the second side were the words following:—

"See over, * That the said four cottages, at her decease,
C. B. shall be given, and shall then belong to, my daughter Eleanor Elizabeth (now the wife of Mr. Cuthbertson), and that the four houses be *her own* property, and to be under her sole controul.

"Charles Birt."

This clause was not seen by the witnesses when they executed the will, but it was proved to have been written before the execution.

C. A. Middleton moved for administration, with the will annexed, including the words written on the back of the will, to be granted to Mrs. Birt, the widow. These words are a mere interlineation, without which the sentence in the will is incomplete. [He referred to *In the Goods of E. White.* (1)]

Searle, for the heir-at-law, consented to the motion.

LORD PENZANCE. As the heir-at-law, the only person interested in excluding the words, consents, I can have no hesitation in making the grant. It seems to be the better course to look upon these words as an interlineation, for the clause without them would be unmeaning. The testator, at the end of the unfinished sentence, has put a mark (*), and under a corresponding mark completes the sentence, and he did this before the will was executed. He clearly intended that the words should be introduced where he made the first mark. By 15 Vict. c. 24, s. 1, it is enacted that no signature, under the Acts, shall be operative to give effect to any disposition or direction which is underneath, or which follows it; but I think that these words, although, as written, they follow the signature, must be read in the place in which the testator intended they should be read, and therefore preceding the signature.

Attorneys for applicant: *Watson & Sons.*
Attorneys for heir-at-law: *Mills & Lockyer.*

(1) 30 L. J. (P. M. & A.) 55.

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Jan. 31.

IN THE GOODS OF T. RICHARDS.

Joint Administration—Widow and Guardian of Minor Children—Special Grounds.

Deceased died intestate, leaving a widow and several minor children by a former wife. During his lifetime he had been assisted in his business by his brother. On the other hand, his widow, to whom he had been married but a short time, was entirely unacquainted with its management. These circumstances were held not to be sufficient to authorize the Court to grant a joint administration to the widow, and to the brother as guardian of the minor children.

THOMAS RICHARDS, of Pontypridd, Glamorganshire, died on the 16th of January, 1871, intestate, leaving a widow, Ann Eliza Richards, and five minor and infant children, the eldest thirteen years of age, the children of a former wife. The deceased was a tallow-chandler, and the principal part of his personal estate consisted of the goodwill, stock-in-trade, and trade debts of that business. He had been assisted in the management by his brother, Eliezer Richards. Mrs. Richards, in her affidavit, stated that she had been informed that by the practice of the Court she was entitled to have administration granted to herself alone, but that, nevertheless, she is desirous that Eliezer Richards, who is the lawful paternal uncle and one of the next of kin of the minors and infants, and who has been duly elected by them as guardian, should be joined with her in the administration, by reason that she is unacquainted with the management of the deceased's business, which should be carried on for the benefit of herself and the children of the deceased, and Eliezer Richards is well acquainted with such business, and formerly managed it for the deceased. The deceased had only been married to his second wife a few months before his death.

Dr. Middleton moved the Court to grant a joint administration to Mrs. Richards and to Eliezer Richards as guardian of the children. All parties desire that a joint administration should issue, and in this case there is a sufficient reason why the Court should sanction such a grant. [He referred to *In the Goods of Newbold.* (1)]

(1) Law Rep. 1 P. & M. 285.

[LORD PENZANCE. If I grant a joint administration in this case, it must be a general grant to the widow, and a limited grant to the guardian, and the latter would probably terminate before the former.]

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IN THE GOODS OF RICHARDS.

The result would be the same as in an ordinary instance of joint administration: when one of the administrators dies, the survivor can carry on the administration alone.

LORD PENZANCE. The widow may renounce her right, and so enable the brother, as guardian, to take administration, or may take the grant herself, and then employ the brother to look after the business. I do not think the circumstances are sufficiently strong to induce me to exercise my discretion in favour of a joint grant. I reject the motion.

Proctors: *Toller & Sons.*

WINDEATT *v.* SHARLAND.

Jan. 24.

Administration—Deceased, a Pauper Lunatic—Guardians of Union—Creditors.

Deceased, at the time of his death, had been for many years supported at a County Lunatic Asylum, as a lunatic, at the expense of the union to which he belonged. The guardians of such union had not obtained any order, under 16 & 17 Vict. c. 97, s. 104, from the magistrates authorizing them to take possession of the property of the deceased in order to repay themselves the charges to which they had been put on his account. The Court was asked to grant administration to the nominee of the guardians as creditors of the deceased, the deceased's sole next of kin, who was also a pauper lunatic, having been cited. The Court held that even supposing the guardians to be creditors of the estate of the deceased, they were not entitled to a grant until they had cited the next of kin of the lunatic next of kin.

THOMAS VINNICOMBE SHARLAND, of the County Lunatic Asylum, Exminster, Devonshire, died there on the 10th of March, 1870, intestate, leaving Elizabeth Harris Sharland, his sister and only next of kin, the only person entitled to his property. The deceased, from the year 1845 up to the time of his death, had been an inmate of the Devon County Lunatic Asylum, at the charge of the board of guardians for the Totness Union, the whole expense to which they had been put on his account amounting to

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179*l.* 12*s.* 9*d.* A sum of 400*l.* 3 per cent. consols is standing in the name of trustees in trust to pay the dividends to the deceased during the joint lives of himself and his wife, Mary Sharland, and in case of the death of Mary Sharland in the lifetime of deceased (which happened, for she died on the 22nd of February, 1865), to transfer the capital to him. On the 21st of May, 1870, at a meeting of the board of guardians of the Totness Union, a resolution was passed directing their clerk, Thomas Windeatt, to take such steps as may be necessary to obtain administration to the estate of Thomas Sharland on behalf of the board, and for that purpose to cite the next of kin of the deceased. Accordingly, a citation was taken out by Mr. Windeatt, which was personally served upon Elizabeth Harris Sharland, at the union workhouse at Kingsbridge, Devonshire, on the 30th of December, 1870, in the presence of the master and mistress of the workhouse and the attendant of the ward in which she was placed; the said Elizabeth Harris Sharland having been for six years an inmate of such workhouse, and of unsound mind, although not found so by inquisition.

No appearance was entered for Elizabeth Sharland.

Inderwick moved for administration to be granted to Mr. Windeatt as the nominee of the board of guardians of the Totness Union, who are creditors of the estate of the deceased.

[LORD PENZANCE. Have they taken any steps under 16 & 17 Vict. c. 97, s. 104, to enable them to obtain possession of the property of the deceased in order to repay themselves the charges they had been put to on his account?]

They omitted to do so in his lifetime, and have had no power to take such proceedings since. He referred to *Guardians of Mile End Old Town* v. *Findlay and others.* (1)

[LORD PENZANCE. No action would lie against the next of kin for the maintenance of the lunatic. There is another difficulty. According to the practice, when the next of kin is of unsound mind, his next of kin are also cited, in order that they may take administration for his use and benefit if they think proper. If such next of kin are unknown, they should be advertised for.]

It is supposed Elizabeth Sharland has no next of kin. The

(1) 3 Sw. & Tr. 265; 33 L. J. (P. M. & A.) 21.

board of guardians of the Kingsbridge Union are the only persons interested on her account, and they have received notice through the master and mistress of their workhouse in whose presence the citation was served.

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WINDEATT v. SHARLAND.

LORD PENZANCE. I am not satisfied that the board of guardians of the Totness Union are creditors of the estate of the deceased; but if they are they are not entitled to a grant until they have cited the next of kin of Elizabeth Harris Sharland. I reject the motion.

Attorneys: *Vizard, Crowder, & Co.*

SAWBRIDGE *v.* HILL.

March 14.

Administration with Will Annexed—Majority of Interests—No Residue—Minor —Grant of Administration with Will Annexed to Unsuccessful Opponent of Will—Costs of Administrator's Unsuccessful Opposition—Practice.

One of four residuary legatees, who was also the testator's next of kin, unsuccessfully opposed the will, and was condemned in costs. The three other residuary legatees—who were minors, and had, by their guardian, propounded the will—applied for a grant of administration with the will annexed to their guardian. The Court refused to make the grant to the guardian because it was proved that in fact there was no residue, and that the next of kin had a larger interest in the specific legacies than the minors. The grant was therefore made to the next of kin, notwithstanding his unsuccessful opposition to the will; and the Court declined to make the grant conditional on the payment of the guardian's costs by the administrator, as by so doing it would delay the payment of legacies to other legatees besides the next of kin and the minors.

JOSEPH HILL, late of Mile End Road, grocer, died on the 26th of December, 1869. By a will and codicil of the 15th of March, 1860, and the 8th of September, 1861, he left the income of 1000*l.* to his wife for life, and at her death gave 600*l.* to his son the defendant, and divided the balance between his son and his three illegitimate daughters; he gave a life interest in three freehold houses to Mrs. Sawbridge, and at her death devised one to each of the daughters, and divided his residuary estate between the son and the three daughters. He appointed an executor, who renounced. The three daughters, who were minors, by Mrs. Sawbridge, their

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SAWBRIDGE v. HILL.

mother, propounded the will and codicil. The defendant opposed them on the grounds of incapacity and undue influence, and the cause was tried before the Court by a common jury. The jury returned a verdict for the petitioner, and the Court pronounced for the will and codicil, and condemned the defendant in costs. It was proved that there is really no residuary personal estate, and that probably there will not be sufficient to satisfy the legacy of 1000*l.*

Feb. 28. *Dr. Spinks, Q.C.*, and *Searle*, for the plaintiff, moved that administration with the will annexed should be granted to her and not to the defendant. The grant is in the discretion of the Court, and the guardian of minors, having a majority of interests, is preferred to a person who, although he is of age, is in a minority of interests. Williams' Executors, pt. i., bk. v., ch. 11, s. 1 (p. 411 of 6th ed.)

Kenealey, Q.C., for the defendant, opposed the application. The defendant is the son and only next of kin, and therefore entitled to the grant. The defendant really has the majority of interests, because, subject to the widow's life interest, he takes 600*l.* out of the 1000*l.*, besides a share of the balance.

Mar. 7. LORD PENZANCE. The question is, to which of the residuary legatees administration with the will of the deceased annexed should go, the grant being in the discretion of the Court. The circumstances are these:—The testator, by his will, gave the interest of 1000*l.* to his widow for life, and at her death 600*l.* to his son; and of the balance he gave one-fourth to his son and three-fourths to his three illegitimate children. The residue was divided between these three children and the son. The three children are minors, but it was contended that the administration ought to go to their guardian on the ground that she represents the majority of interests. If this were simply a question between residuary legatees that would be the ordinary rule, but the Court must bear in mind that in this case there is probably no residue, for the 1000*l.*, or at any rate a considerable portion of it, does not appear to be in existence. The argument founded on the majority of interests becomes very weak when it appears that the interests

probably amount to nothing at all. On the other hand, the son is the next of kin, and he is the only one of the residuary legatees who is of full age. Under these circumstances the Court is, in some measure, guided by the statute, and in the exercise of its discretion grants administration with the will annexed to the son.

Dr. Spinks moved that the son might be ordered to give justifying security, and that the plaintiff might have her costs out of the estate in the first instance, as she was not likely to recover them from the defendant, and she had successfully upheld the will against his opposition. The defendant ought not to be allowed to take the grant until the costs had in some way been secured to her.

LORD PENZANCE. I will consider whether I can make any order for the purpose of securing the plaintiff's costs before the grant issues to the defendant.

Mar. 14. LORD PENZANCE. The plaintiff in this case obtained a verdict in favour of the will, and the defendant was condemned in costs; but the defendant, in my judgment, was entitled to the grant of administration with the will annexed, he being the only next of kin, and the other residuary legatees being minors. It is said that if he obtains the grant the plaintiffs will be unable to get their costs from him. Upon consideration, I think that is not a ground which ought to induce the Court to impose terms upon him for this reason. The personal estate, whatever there is of it, is to be applied, in the first instance, to the maintenance of the testator's widow; and the costs, which the plaintiff has a right to get from the defendant, ought not to come out of the personal estate, and so diminish the widow's income. And by throwing such an impediment in the way of the grant as ordering the defendant to pay or give security for costs before taking it, the Court would delay the benefit which the widow is entitled to under the will. Therefore I can only order that the plaintiff shall give justifying security.

Attorneys for plaintiff: *Mills & Lockyer.*
Attorneys for defendant: *Miller & Miller.*

1870
July 30.

BABBAGE *v.* BABBAGE AND MANNING.

Evidence—Cross-Examination as to Adultery—32 & 33 Vict. c. 68, s. 3.

A witness cannot be cross-examined as to any act of adultery respecting which he or she has not been examined in chief, although such adultery may not be a question in issue in the cause.

THIS was an action by a husband for dissolution of marriage, on the ground of his wife's adultery with the two co-respondents. The petition contained a claim for damages. The respondent and the co-respondents traversed the allegations in the petition, and the case came on for trial before the Judge Ordinary, by a special jury.

The petitioner was examined in support of the petition. At the time of his marriage with the respondent he was a widower.

M. Chambers, Q.C. (*Dr. Swabey* with him), for the co-respondent, Manning, asked him in cross-examination whether he had been guilty of adultery with some woman during the life-time of his first wife.

Dr. Spinks, Q.C. (*Searle* with him), for the respondent, objected to the question. The 3rd section of 32 & 33 Vict. c. 68, enacts that no witness, whether a party to a suit or not, shall be liable or bound to answer any question tending to shew that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceedings in disproof of his or her alleged adultery.

M. Chambers. I am entitled in mitigation of damages to cross-examine the petitioner as to his character. Before the statute I should clearly have been entitled to put the question, and the statute can only be intended to apply to the adultery which is in question in the suit.

Dr. Deane, Q.C. (*Inderwick* with him), for the respondent.

THE JUDGE ORDINARY. The words of the section are quite clear, and I must not allow you to put any question tending to shew that the witness has been guilty of adultery.

Proctor for petitioner: *E. W. Crosse.*

Solicitors for respondent and co-respondents: *Whitakers & Co.*

MANNING *v.* MANNING.

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Feb. 9.

Want of Jurisdiction—Bonâ fide Residence within the Jurisdiction—Occasional Residence—Suit for Judicial Separation.

Mere residence in England at the time of the institution of a matrimonial suit is not sufficient to found the jurisdiction of the Court. The residence of the petitioner must be bonâ fide, and not casual or as a traveller.

A husband, whose domicil of origin was Irish, having presented a petition for judicial separation on the ground of desertion, the wife appeared under protest and pleaded to the jurisdiction. Although the husband made an affidavit, stating that he was permanently settled in England, and had no intention of returning to the place of his domicil of origin, the Court came to the conclusion, on the affidavits, that he was not a bonâ fide resident in England, and therefore dismissed the petition.

1 P.D. 44
6 P.D. 42

THIS was a petition by Joseph Manning, described therein as of 11 Chepstow Place, Bayswater, in the county of Middlesex, mantle-maker, for a judicial separation on the ground of his wife's desertion for two years and upwards. The respondent, Jane Manning, of No. 8 McGowan Terrace, Ranelagh Row, in the city of Dublin, appeared under protest and pleaded to the jurisdiction. Her solicitors in their act on petition alleged that the said Joseph Manning was born in Ireland, and that his parents were Irish, and that he never acquired an English domicil, and that his residence and his place of business were in Ireland, and that he always has been, and still is, a domiciled Irishman. They further alleged that the cohabitation between Joseph Manning and Jane Manning was in Ireland, and that in the month of October, 1866, Jane Manning presented a petition to the judge of the Provincial Court of Dublin, praying for a decree of restitution of conjugal rights, and that the said suit is still pending. The petitioner's proctors in their answer alleged, in substance, that the petitioner's father, although an Irishman by birth, had acquired an English domicil, that the petitioner's domicil, at the time when he attained his majority, was English; that in 1853, being then twenty-two years of age, he obtained a situation in Dublin; and that in 1858 he went into business in Dublin on his own account; that up to the month of February, 1870, he resided in Dublin, carrying on the business of a mantle-maker, and silk and shawl merchant; that in

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the month of March, 1870, he came over to England for the purpose of establishing himself in business and of settling in London; and in the same month took a lease of a shop at 131 Westbourne Grove, Bayswater, in the county of Middlesex, for twenty-two years, where he has since settled and carried on the business of a mantle-maker and silk and shawl merchant; and that he has ever since been, and was at the date of filing his petition in this suit, in the month of March, 1870, resident in Bayswater, within the jurisdiction of this Court; and that he has no intention whatever of returning to reside in Ireland. They further alleged that the petitioner, by reason of his being permanently settled in London, has ceased to be subject to the jurisdiction of the Provincial Court of Dublin. The respondent's solicitors, in their reply, denied these allegations, and alleged that the petitioner still carried on his business in Dublin and had his permanent residence there.

A number of affidavits were filed on both sides. The petitioner, in his affidavit, deposed as follows:—

"That ever since the month of March, 1870, my usual place of residence and my home has been in Bayswater, within the jurisdiction of this Court, and that I have no intention whatever of returning to reside in Ireland, but that for the present, and in addition to my business in Bayswater, I also still continue to carry on the business of a mantle-maker and shawl and silk merchant in Dublin, but I have an intention of disposing of the same, and it has, in fact, been in the market for nearly a twelvemonth, and I have now a reasonable prospect of speedily disposing of the same."

The lease of the premises in Bayswater was produced, and appeared to be the lease of a shop forming the part of a ground floor only, and not of a residence. It further appeared that it was terminable at any time by the lessee on six months' notice.

Dec. 15. *O'Malley, Q.C.*, and *Searle*, for the respondent. The petitioner's permanent place of residence and of business is in Dublin, and a mere occasional residence in London is not sufficient to give the Court jurisdiction. He has submitted to the jurisdiction of the Irish Court, which clearly has jurisdiction to entertain the suit for restitution now pending; and it would be most

inconvenient to hold that both the English and the Irish Matrimonial Courts have jurisdiction over the same parties, especially in such a suit as the present one. Desertion not being recognized as a matrimonial offence by the Irish Court, that Court will be bound to pronounce a decree of restitution, whilst this Court, should desertion be proved, will be bound to grant a judicial separation.

Dr. Deane, Q.C., and *Dr. Tristram*, for the petitioner. This is a question not of testamentary domicil, but of matrimonial jurisdiction, and mere residence is sufficient to found that jurisdiction. The petitioner's affidavit is conclusive as to his intention, and the fact that he has not yet got rid of his business in Dublin does not deprive him of the right to sue in this court.

The following cases were cited: *Earl of Dalhousie* v. *McDowall* (1); *Brodie* v. *Brodie* (2); *Simonin* v. *Malac* (3); *Yelverton* v. *Yelverton* (4); *Callwell* v. *Callwell and Kennedy* (5); *Carden* v. *Carden* (6); *Attorney-General* v. *Dunn* (7); *In re Capdevielle* (8); Story's Conflict of Laws, ss. 46, 47.

Cur. adv. vult.

Feb. 9. THE JUDGE ORDINARY. This case appeared to raise some questions of very considerable difficulty and of great importance. The suit is one by the husband against the wife for desertion, and the wife has pleaded to the jurisdiction, alleging that the husband is not a domiciled Englishman, or resident in England in such a manner or to such a degree as to entitle him to sue in the court. The husband and the wife undoubtedly lived together for several years in Ireland, and a suit is actually pending between them in the Irish Matrimonial Court. It appeared likely that the Court would have to determine under what circumstances, and to what degree or extent residence, and nothing more than residence, may be sufficient to enable a petitioner to sue in this court; but I forbear to enter upon the investigation of this question, because on a

(1) 7 Cl. & F. 817.
(2) 2 Sw. & Tr. 259; 30 L. J. (P. M. & A.) 185.
(3) 2 Sw. & Tr. 67; 29 L. J. (P. M. & A.) 97.
(4) 1 Sw. & Tr. 574; 29 L. J. (P. M. & A.) 34.
(5) 3 Sw. & Tr. 259.
(6) 1 Curt. 558.
(7) 6 M. & W. 511.
(8) 2 H. & C. 985; 33 L. J. (Ex.) 306.

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careful survey of the affidavits which have been filed, I am clearly of opinion that the very groundwork of the petitioner's claim to institute a suit in this court fails upon the facts. He alleges that his father was an Irishman by birth, and that he himself was born in Ireland. There is no doubt that his domicil of origin was Irish. He goes on to allege that his father brought him over to England when a child, and that when his father came over here he did so with the intention of changing his domicil, and becoming domiciled in England. This allegation is met by affidavits on the other side, and in my judgment the proposition that the father acquired a domicil in England, and that by consequence the domicil of the son also became English, has not been supported. When the matter was before the Court that part of the case was abandoned, or at least was not pressed by the petitioner's counsel. But then it was said that it is not necessary that the petitioner should be a domiciled Englishman to entitle him to sue in this court; and the case of *Brodie* v. *Brodie* (1) was cited in support of that proposition. In that case the Full Court observed, "the question is whether the petitioner has acquired an English domicil." Dr. Phillimore, who appeared for the petitioner, replied, "Enough has been proved to establish domicil for the purpose of founding jurisdiction, whether it would be sufficient for other, e.g., testamentary purposes, may be another question. Here is a bonâ fide residence in this country with the intention of its being permanent." Then the Full Court pronounced judgment in these terms:—"We say nothing as to what the effect of the evidence might be in a testamentary suit; we think that the petitioner was a bonâ fide resident here, not casually, or as a traveller; after he became resident here his wife was carrying on an adulterous intercourse in Australia. He is therefore entitled to a decree nisi for a dissolution of his marriage." Now I shall forbear to discuss the questions whether there can or ought to be two sorts of domicil; whether a bonâ fide residence alone can in any sense be called a domicil, and whether the mere fact of residence ought or ought not to be sufficient to entitle a party to sue in this court. I will remark in passing, that when the case has been reversed, and when the Courts of this country have had to consider how far

(1) 2 Sw. & Tr. 259; 30 L. J. (P. M. & A.) 185.

persons who are domiciled Englishmen shall be bound by the decree of a foreign Matrimonial Court, the strong tendency has been to repudiate the power of the foreign Court under such circumstances to dissolve an English marriage. It would be unfortunate if an opposite course should be followed by the Courts of this country, when they are determining to what extent they will entertain the matrimonial suits of foreigners. But I say no more upon those questions, because I think that the proposition of the Full Court, namely, that a party is entitled to sue in this court who is a bonâ fide resident here, not casually, or as a traveller, is sufficient for the decision of this case. The question is whether the facts bring the petitioner within that proposition. In my judgment they do not. He has carried on business for years in Dublin, and he still has the same business in Dublin. There are several affidavits which shew that he has a residence in Sackville Street, the place where the business is carried on in Dublin. There are the affidavits of four or five persons, at least, to shew that after the month of March, 1870, when he alleges that he came to this country and settled, as he calls it in Bayswater, he was continually residing in Sackville Street. He says, "In the month of March, 1870, I came over to England for the purpose of establishing myself in business and settling in London, and in the same month took a lease of a shop at 121 Westbourne Grove, Bayswater, in the county of Middlesex, for twenty-two years, at a rent of 150*l.* per annum, where I have since settled and carried on the business of a mantle-maker, and silk and shawl merchant, and that ever since the month of March, 1870, my usual place of residence and my home has been in Bayswater, within the jurisdiction of this Court, and that I have no intention whatever of returning to reside in Ireland." Now I need not go into the affidavits on the other side, but there is one, an affidavit by a servant in the house, saying that so far from being resident in London in March, 1870, he was constantly residing in his house in Sackville Street, in Dublin, that his clothes were there, and that the furniture of his bed-room was there, and in the same condition as before March. And when this so-called settling in London comes to be investigated, it turns out that although he has a place of business in Bayswater, it is only a shop, that it consists of only one room, that it has no resi-

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dential apartment attached to it, and that there is a clause in the lease that he may put an end to it at any time upon either a six or twelve months' notice. Thus there is nothing permanent in the mode in which he has taken this shop. It is a shop and nothing more, and the language of his affidavit is carefully worded, so as not to point out where he is living and residing in this country. Under these circumstances I am satisfied that it has been proved on the part of the respondent that he is really resident in Dublin, and that in no sense can he be said to come within the definition of a bonâ fide resident in England.

Petition dismissed with costs.

Proctors for petitioner: *Brooks & Co.*
Solicitors for respondent: *Johnson & Coote.*

March 21.

WAIT *v.* WAIT AND FLOWER.

Suit for Dissolution—Decree Absolute—Application for Costs against Respondent —Practice.

After a decree has been made absolute in a suit for dissolution of marriage the Court cannot condemn a party in the costs of the proceedings.

THIS was a suit brought for a dissolution of marriage by Charles Wait against his wife Eliza Jane Wait by reason of her adultery with Frederick Flower. It was tried before the Judge Ordinary and a common jury, and on the 2nd of July, 1870, a decree nisi was made, and the co-respondent was condemned in costs. The decree nisi was made absolute on the 7th of January, 1871. It had not been possible to serve the order for costs on the co-respondent, and if the order had been served it was not likely that any would be recovered from him. The respondent had a separate income which amounted to about £500 per annum.

March 14. *Dr. Deane, Q.C.* (*Dr. Swabey* with him), applied to the Court to condemn the respondent in the costs of the suit. He referred to *Carstairs* v. *Carstairs and others* (1); *Miller* v. *Miller* (2); and *Milne* v. *Milne and Fowler.* (3)

(1) 3 Sw. & Tr. 538; 33 L. J. (P. M. & A.) 170.
(2) Ante, p. 13.
(3) Ante, p. 202.

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Inderwick, for the respondent. It is not the rule that in all cases the Court will condemn a respondent who has separate property in her husband's costs of successful litigation, it is only under special circumstances, which do not appear to arise here. But, moreover, this Court cannot entertain an application for costs after the decree has been made absolute, for the suit is at an end. The application should have been made at the time of the decree nisi, or at any rate between that time and the date of the decree absolute. The respondent would now have no opportunity of appealing to the House of Lords from such an order.

THE JUDGE ORDINARY. An appeal from the decree absolute would include all such orders. On the merits I have no doubt the respondent ought to pay the costs; but I will take time to consider the technical point raised.

Cur. adv. vult.

March 21. THE JUDGE ORDINARY. I took time to consider an application to condemn the respondent in the costs which her husband had incurred in proving her adultery with the co-respondent. The adultery was established, and at the trial on the application of the petitioner I condemned the co-respondent in the costs; but such costs have not been recovered from him, nor are likely to be. I am now asked to condemn the respondent in these costs, as she has property of her own, and is quite able to pay them. From the circumstances which appeared at the trial, if the application had been made then the Court would, without doubt, have made the order. But the question arises whether it is not now too late, the decree absolute having been made some time ago, and this being the first application in the matter. The section as to costs in the statute is the 51st (20 & 21 Vict. c. 85): "The Court on *the hearing* of any suit under this Act, and the House of Lords on *the hearing* of any appeal may make such order as to costs as to such Court or House respectively may seem just." In the very terms of the Act it is at *the hearing* that the Court shall exercise its discretion, and it is the universal practice of all Courts at the time of trial to determine what order ought to be made as to costs. It is true that sometimes the final decision is adjourned in order to allow of an application as to costs; but in

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such a case the Court acts within the spirit of the statute. Now in this case no application was made at the trial to condemn the respondent in costs, nor was there any adjournment to allow such an application to be made. I must therefore refuse to do so.

Attorneys for petitioner: *Wright & Venn.*
Attorney for respondent: *W. Hitchcock.*

March 7.

SPENCER AND SPENCER *v.* WILLIAMS.

Administration Suit—Suit in Chancery—Certificate therein as to Next of Kin—Estoppel.

If parties litigate a question in a court of competent jurisdiction, and a final decision be given thereon, such parties or those claiming through them cannot afterwards reopen the same question in another court. This restriction does not extend to other persons whose interest is almost identical with that of one of the parties to the first suit if they do not actually claim through such party.

MARY EMSLEY, late of No. 9, Grove Road, Mile End Road, Middlesex, died on or about the 13th of August, 1860, a widow and intestate. In the year 1861, a suit was instituted in the Court of Probate (*Dyke* v. *Williams*) in which the Queen's Proctor claimed administration of the effects of the deceased, on behalf of the Crown, by reason that she was a bastard; the defendant in that suit, Samuel Williams, alleged himself to be the lawful nephew, and one of the next of kin, of the deceased. The questions at issue were tried before Sir Cresswell Cresswell and a special jury, in June, 1862, and a verdict found in favour of the defendant. In November, 1862, caveats were entered against the grant of letters of administration to Samuel Williams, of the goods of the deceased, on behalf of William Henry Spencer, and also of James Druce and William Druce, who described themselves as nephews and next of kin of the deceased. A declaration was filed in the suit of *Williams* v. *Spencer*, on behalf of the plaintiff, but in March, 1863, the contentious proceedings were discontinued, and on the 14th of April, 1863, administration was granted to Samuel Williams. In the same month two suits were instituted in the Court of Chancery for the administration of the estate of the deceased, the first between Joseph Williams, plaintiff, and Samuel Williams (a bankrupt) and

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Walter Thomas Emm, his assignee, defendants; and the other between James Druce and William Druce, plaintiffs, and Samuel Williams (a bankrupt) and Walter Thomas Emm, his assignee, Abraham Williams and Joseph Williams, defendants. On the 24th of April, 1863, an order was made in these suits directing that an inquiry should be taken who were the next of kin of the deceased, and her heir-at-law at the time of her death; and in consequence an advertisement dated July 3rd, 1863, was inserted in the newspapers, calling upon those who claimed to be heir-at-law and next of kin of the deceased to prove their claims before the Master of the Rolls, and to enter appearances for that purpose before the 27th of July, 1863. Subsequently Elizabeth Gotz, Sarah Spencer (as administratrix of William Henry Spencer, who had died on the 10th of January, 1863), and Elizabeth Batchelor, obtained leave to attend proceedings in these suits, and on their behalf and on behalf of the other parties affidavits were filed and witnesses examined and cross-examined; and the chief clerk certified, on the 5th of February, 1868, that the next of kin of Mary Emsley living at the time of her death were Samuel Williams, Elizabeth, the wife of Joseph Gotz, Abraham Williams, and Joseph Williams (the children of intestate's brother, Samuel Williams), William Henry Spencer (child of William Spencer, intestate's brother by the half blood), James Druce, William Druce and Elizabeth Ann, the wife of Michael Batchelor (children of intestate's sister by the half blood, Elizabeth Ann Spencer) of whom William Henry Spencer and James Druce have since died. He also certified that Samuel Williams was and is her heir-at-law. On the 22nd of February, on the application of Sarah Spencer and George Frederick Spencer (the son of an elder brother, deceased, of William Henry Spencer) to vary this certificate, the matter was adjourned into court, and on the 13th of January, 1869, the Master of the Rolls made an order varying such certificate by omitting the names of Samuel Williams, Elizabeth Gotz, Abraham Williams, and Joseph Williams from the enumeration of the next of kin, and by striking out the paragraph which relates to the heir-at-law, and by certifying that George Frederick Spencer was at the time of the death of Mary Emsley, and is still, her heir-at-law. On the 30th of July, 1870, Caroline Spencer and Sarah Rose Spencer, two of the children of William

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Henry Spencer, on the renunciation by Sarah Spencer (the administratrix of William Henry Spencer), William Druce, Elizabeth Ann Batchelor, widow, and Elizabeth Druce (the administratrix of James Druce, deceased), the next of kin, or representatives of the next of kin, of the deceased at the time of her death, of all right to administration of her effects, and with their consent applied for and obtained a citation to issue, calling upon Samuel Williams to bring into the probate registry the administration granted to him on the 14th of April, 1863, and to shew cause why it should not be revoked and declared null and void. This citation was personally served upon Samuel Williams, who entered an appearance thereto, and filed an affidavit in which he stated that the letters of administration which had been granted to him were lost or mislaid. Caroline Spencer and Sarah Rose Spencer then filed a declaration in which they alleged that Mary Emsley died intestate, and that her next of kin at her death were William Henry Spencer, James Druce, William Druce, and Elizabeth Ann Batchelor; that all the next of kin alive and the representatives of those who have died had renounced in their favour, and that they are two of the natural and lawful children of William Henry Spencer. Samuel Williams pleaded that in addition to the next of kin set out in the declaration, the deceased left others, to wit, himself, Elizabeth Gotz, Abraham Williams, and Joseph Williams, his natural and lawful nephews and niece. The plaintiffs in reply set out the proceedings in the Court of Chancery, in the administration suits, and the amended certificate of the chief clerk of the Master of the Rolls as to the next of kin. That the order made by the Master of the Rolls (13th of January, 1869) had been enrolled and had not been appealed against. The defendant demurred to this replication, and the plaintiffs joined in the demurrer.

Inderwick for the defendant. The question is whether a decree in the Court of Chancery as to the legitimacy of an individual is to be taken as conclusive in this court against that person, on an application by him for a grant of administration. In order that a decree of the Court of Chancery should act as an estoppel in a suit in this court, it must be shewn that there is the same plaintiff

and the same defendant in each suit, and that the same question, and that a material one, is distinctly in issue in both courts. The plaintiffs in this suit were no parties to the suit in Chancery—that is, there was no issue raised by bill and answer between them and any party before that Court. He referred to *Barrs* v. *Jackson.* (1)

Dr. Spinks, Q.C. (*Witt* and *Pritchard* with him) for the plaintiffs. If this suit is allowed to go on, there may be a conflict between this court and the Court of Chancery. In both courts the question is, Who were the next of kin of the deceased at her death? The Court of Chancery has decided that Samuel Williams, the defendant, was not next of kin, nor entitled in distribution, and therefore that he has improperly obtained administration in this court. If there be no estoppel, the defendant may continue to hold administration, although in a suit, in which all the parties interested in the estate, as well as himself, were before the Court of Chancery, it was determined he is not entitled to it, and the Court of Chancery will be compelled to order him to act as trustee for the next of kin. In all cases of estoppel the substantial question is, was the point litigated before a competent court; if so, this Court will follow its decree: *Blackham's Case* (2); *Thomas* v. *Ketteriche* (3); *Bouchier* v. *Taylor* (4); Hargreaves' Law Tracts, 472.

[LORD PENZANCE. This Court has already decided, after litigation, that Samuel Williams is entitled to administration. Do you contend that the Court of Chancery ought not, after that, to have inquired into the matter at all?]

The previous litigation was between Williams and the Queen's Proctor, and the point was the legitimacy of the deceased, which was entirely different from the present. The issue of fact decided by the Court of Chancery is the very one proposed to be re-opened in this court. A technical objection has been taken that the plaintiffs, or those through whom they claim, were not parties to the Chancery suits, but the decree was as binding upon them as if they had been formal parties on the record, by reason of the usual advertisements calling upon the next of kin to substantiate their claims (15 & 16 Vict. c. 86). Mrs. Spencer obtained leave to attend the

(1) 1 Phill. Ch. R. 582.
(2) 1 Salk. 290.
(3) 1 Ves. Sen. 333.
(4) 4 Browne P. C. 708.

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proceedings, and, in fact, it was on her application that the chief clerk's certificate was varied by the Master of the Rolls. The present plaintiffs are privies in blood with Mrs. Spencer, and therefore the decree in the Court of Chancery was conclusive between them and Samuel Williams, and they are entitled to the benefit of it.

[LORD PENZANCE. If Mrs. Spencer herself were now applying for administration, instead of her children, do you maintain that she could not set up the decree of the Court of Chancery as an estoppel?]

Inderwick. Yes, because those suits would not have been between the same parties as the one in this court, so as to prevent its going on. There has been no decision between her and Samuel Williams.

[LORD PENZANCE. As regards the distribution of the property, the matter is concluded for all time between Mrs. Spencer and your party, however she may have been introduced into the Chancery suit.]

Possibly for the purposes of distribution; but the question of administration is still open. The present plaintiffs do not claim through their mother; they are entitled to one part of the estate and she to another.

[LORD PENZANCE. They do not claim through their mother, but through the same person the mother does. Suppose both suits had been in this court. A man dies, and his next of kin come in to litigate who is entitled to administration. The court grants it to one who afterwards dies. On an application for a de bonis grant can the litigation be re-opened? Is the matter to be decided once for all, or not? In such a case the parties to the suits would not be the same, and yet would not the first decision be binding?]

Cur. adv. vult.

March 7th. LORD PENZANCE. In this case a demurrer was argued before me a short time since. The declaration filed in the cause stated that Mary Emsley died intestate, and that her next of kin at her death were William Henry Spencer, James Druce, William Druce, and Elizabeth Ann Batchelor; that William Henry Spencer had since died intestate, and that Sarah Spencer had taken administration of his effects, and that James Druce had

also died, and Elizabeth Druce had become his representative. It further alleged that the plaintiffs, Caroline Spencer and Sarah Rose Spencer, are two of the children of William Henry Spencer, and that the next of kin of the deceased still living, and the representatives of those dead, have renounced administration of the goods of Mary Emsley in their favour. The plea of the defendant, in substance, denies the allegations of the plaintiffs that the persons named in the declaration are the only next of kin, and affirms that the defendant and three other persons are also next of kin. The replication took issue on the pleas, and further set out the proceedings in the two Chancery suits, in one of which Joseph Williams was plaintiff, and Samuel Williams (the present defendant) and his assignee defendants; and in the other, James Druce and William Druce, plaintiffs, and Samuel Williams and his assignee, Abraham Williams, and Joseph Williams, defendants. It also alleged that Sarah Spencer (the mother of the plaintiffs) became a party to those suits, and that the Master of the Rolls made an order therein by which he determined that the only next of kin are those named in the declaration, and that Samuel Williams, the defendant, is not next of kin. The defendant demurred to the replication. The defendant is in possession, as next of kin of the deceased, of administration granted to him by this Court after litigation with the Queen's Proctor, in which suit there was no contest between Samuel Williams and the present applicants. The plaintiffs ask that such administration shall be revoked, and a new grant made to them, on the ground that Williams never was next of kin, and that it has been so decided by a court of competent jurisdiction. The question for my decision is, whether the decree of the Master of the Rolls is an estoppel to the proceedings in this court. Now, of one thing there is no doubt, and it is a principle which was clearly laid down in *Barrs* v. *Jackson* (1), that when a question of fact arises in this court as to which of two persons is next of kin of a deceased, and is determined, and the same question is afterwards raised between the same parties in any other court, they may be estopped from proceeding in the latter suit. The decision in *Barrs* v. *Jackson* (1) was founded on a true principle, and supported by a sound judgment. If two parties

(1) 1 Phill. Ch. R. 582.

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have once, before a court of competent jurisdiction, litigated any question of fact, and that question has been finally decided, it is not reasonable that either of them, in any other court, should reopen it. Generally, therefore, if administration has been granted in this court, after litigation here upon the question whether the one party or another is next of kin, and thereafter the same question, between the same parties, is raised in the Court of Chancery, that court will respect the decision in this court. Such was the case of *Barrs* v. *Jackson* (1), in which the Court of Chancery held the parties were barred. It is material to observe, in passing, that in the Court of Chancery, in that case, the parties were actually, one a party to the suit in the Ecclesiastical Court, and the other a party claiming under the party to the original suit. So that the principle is carried one degree further, and not only is the suit barred where the parties are the same, but where they claim under the original parties. Can the doctrine in these cases be extended any further? In the suit before me the parties are not the same as in the suits in the Court of Chancery, nor do they claim under the same. The parties in the suits of Chancery were Sarah Spencer, Samuel Williams, and others. Here the plaintiffs are the children of Sarah Spencer, but they do not claim through their mother as such, or under her in her character of administratrix of their father; they rest their claim on the ground that Mary Emsley died intestate, leaving certain next of kin, who have all renounced and refused to take administration, and that they are the next of kin of one of the next of kin of the deceased, and that without a grant they cannot obtain that to which they are entitled. They invoke the rule of this Court under which, if the next of kin choose to stand aside and renounce their rights, the next of kin of the next of kin is entitled to represent the intestate. It would be improper to say that, applying in that character, they derive their title through their mother, Sarah Spencer. She might have applied herself, but she elected to stand aside. If she had come here, it is hardly necessary to say that Williams would have been bound by the decision of the Court of Chancery as against her; but is he barred as against the children? They claim this grant on the ground that they are the children of their father, and there-

(1) 1 Phill. Ch. R. 582.

fore stand in the relation of next of kin of the next of kin of Mary Emsley; but they do not claim the grant *through* their father, still less do they claim it *through* their mother in the character of their father's executrix.

They stand on an independent right which accrued to them in relation to Mary Emsley's estate upon the renunciation of the next of kin who had the prior right.

There is another principle applicable to the doctrine of estoppel; it must be mutual. If Williams is barred from further proceedings against the plaintiffs, they must have been barred against him if the decision in the Court of Chancery had been in his favour. But it would be contrary to justice to hold that because somebody else had litigated this question without success the plaintiffs should suffer. Everybody litigates on his own responsibility, and no one can be deprived of his rights because somebody else has taken proceedings which have turned out unsuccessful. It is impossible to say that the defendant was barred by the proceedings in Chancery. As regards the cases cited, no case goes further than *Barrs* v. *Jackson* (1). In *Thomas* v. *Ketteriche* (2) the parties in the Ecclesiastical Court and in the Court of Chancery were the same. In *Blackham's Case* (3) it was decided that where a matter between the same parties had been directly determined in the Ecclesiastical Court, it could not be gainsaid, but that, in that particular case, the question for the decision of the Court had not been raised in the Ecclesiastical Court—the question, namely, whether a certain person was the husband of the deceased. It is proper, therefore, where the question is raised between the same parties, or those claiming under them, that they should be estopped; but the decisions give no authority for a proposition of a wider character—that a party who was not a party in the original litigation shall be bound by the result. Such a party may defend his rights in this court. I overrule the demurrer, with costs.

Proctors for plaintiffs: *Pritchard & Sons.*
Attorneys for defendant: *Lovell, Son & Pitfield.*

(1) 1 Phill. Ch. R. 582. (2) 1 Ves. Sen. 333. (3) 1 Salk. 290.

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GARRARD *v.* GARRARD.

Administration with will annexed to Residuary Legatee—Consent of Executor—Practice.

The Court will not grant administration with the will annexed to the residuary legatee, with the consent of the executor. It can only do so on the executor's renunciation of probate, or after a citation has been served upon him, upon his non-appearance within the prescribed time.

Hatsell Garrard, formerly of Sutton, Surrey, farmer, died on the 22nd of November, 1868, having executed a will, bearing date the 15th of February, 1841, in which he appointed Robert Garrard, who died in his lifetime, Edward Lane and Hatsell Mellersh Garrard, executors and residuary legatees in trust, and Mary Ann Garrard his daughter, one of the residuary legatees. Edward Lane renounced probate of the will and administration with the will annexed. On the 1st of February last a citation was taken out of the registry, calling upon Hatsell Mellersh Garrard to take probate or shew cause why administration with the will annexed of the deceased should not be granted to Mary Ann Garrard. In consequence of the absence abroad of Hatsell Mellersh Garrard an abstract of the citation was ordered to be inserted in the *Times* of the 4th of February, 1871, in the *Standard* on the 10th of February, and in the *Daily News* on the 18th of February. On the 9th of February an appearance was entered in the registry for the executor cited by Mr. William Sturt, solicitor.

March 7. *Searle* moved that administration be granted to Mary Ann Garrard, as one of the residuary legatees named in the will of the deceased.

Inderwick, on the part of the executor, consented to the grant being so made.

Lord Penzance. I cannot grant the administration on the consent of the executor. The executor must either renounce probate or withdraw his appearance. In the latter case, after the time for appearance mentioned in the citation has elapsed, the residuary legatee will be entitled to administration as of course.

Attorneys for applicant: *Phillips & Willicombe.*
Attorney for executor: *W. Sturt.*

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March 14.

Administration Suit—Legitimacy of Deceased—Affirmative Verdict—No Costs asked for—Lapse of Nine Years—Application for Costs—Practice.

In a suit between the Queen's Proctor and a party claiming to be next of kin as to the legitimacy of a deceased, a verdict was given in favour of, and administration granted to, such alleged next of kin. Under the impression that he could pay his costs of suit out of the property of the deceased, no application was made by him to the Court at the time of trial in reference to that matter, but in consequence of proceedings in Chancery he had been unable to recover such costs. A citation having been served upon him to shew cause why the administration should not be revoked, by reason that he was not one of the next of kin of the deceased, he applied to the Court, after the lapse of nine years, to make a formal order that his costs of suit against the Queen's Proctor should be paid out of the deceased's estate. The Court refused to do so, *after* such lapse of time.

In the year 1862 a suit between the Queen's Proctor and Samuel Williams in reference to the legitimacy of Mary Emsley, late of Grove Road, Mile End, in the county of Middlesex, deceased, was brought to a hearing before Sir Cresswell Cresswell and a special jury, and a verdict given in favour of Samuel Williams, who claimed to be her nephew, and one of her next of kin. (1) No application was made to the Court in reference to the defendant's costs at the trial. Subsequently caveats were entered by William Henry Spencer, and by James Druce and William Druce, who also claimed to be nephews and next of kin; but in March, 1863, contentious proceedings were discontinued, and on the 14th of April, 1863, administration of the goods of the deceased was granted to Samuel Williams with the sanction of those parties. Two suits were then instituted in the Court of Chancery to administer the estate of the deceased, and in January, 1869, the chief clerk to the Master of the Rolls, by an amended order, certified that Samuel Williams was not one of the next of kin of the deceased at the time of her death. A further order was also made in those suits, by which Samuel Williams was allowed his costs of taking administration, and also of the administration suit in Chancery, as between attorney and client, out of the estate of the deceased, but not the costs of litigation with the Queen's

(1) 2 Sw. & Tr. 491.

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Proctor. In July, 1870, a suit was instituted in the Court of Probate for the purpose of revoking the administration granted in the year 1863 to Samuel Williams, and such suit is still pending.

March 14. *Inderwick*, for Samuel Williams, moved the Court to make a formal order allowing him his costs of suit against the Queen's Proctor out of the estate of the deceased. At the time of trial no application was made, because it was assumed that as administrator he could take them without any order. In consequence, however, of the litigation in the Court of Chancery he had been unable to obtain the costs, and the Master of the Rolls considered he had no jurisdiction to order such costs to be paid out of the estate, as no directions had been obtained from this Court that they should be so paid. Whether Mr. Williams is next of kin or not, the course taken by him in litigating with the Queen's Proctor was for the benefit of all parties interested in the estate who indeed sanctioned the proceedings, and he ought to be repaid the costs.

Dr. Spinks, Q.C., and *Waller*, for the next of kin of the deceased. The other party never had any title whatever to intermeddle in the affairs of the deceased, and has no claim for his costs in doing so. If he had had any right to such costs the Master of the Rolls would have allowed them, as he did the costs of administration. It is the ordinary practice in the Court of Chancery in an administration suit to allow costs of litigation in other courts. Moreover, in consequence of the lapse of time, the parties who would now receive these costs may not be the persons entitled to them. The defendant since 1863 has been a bankrupt, and his assignee is not before the Court, neither is the attorney who then acted for him. Again, the persons entitled to the deceased's estate have not received notice of the application. The order in the Chancery suits is final, and the estate thereby administered, so that there is no fund out of which these costs can now be recovered.

LORD PENZANCE. The ground on which this application is put forward now is, that in the first instance the defendant went to the Court of Chancery, and the Master of the Rolls said that he could not give him his costs in his litigation with the Queen's Proc-

tor because he had no jurisdiction to do so. I doubt whether that can be a correct statement of what passed before the Master of the Rolls; and I am fortified in that doubt by what has just been addressed to me by the counsel, who was also one of the counsel in the suits in the Court of Chancery. He states that if an administrator is taken into that court and his accounts are rendered and investigated, the judge has power to decree that such and such sums of money which he claims to have expended as costs, ought or ought not to be allowed to him. I may notice, that probably the observation of the Master of the Rolls, upon which the other side rely, may have amounted to this, that if the Court of Probate had given costs out of the estate, he should have been bound to allow the item in the defendant's accounts. Passing that by and coming to the merits of the case, I do not think it follows that because the defendant was not really next of kin he should not be entitled to recover the expenses he incurred when he thought he was next of kin, in shaking off the claim of the Crown upon this estate. The Crown litigated the question of the legitimacy of the deceased, and through the agency of the defendant that question has been set at rest; a matter of the greatest importance to all who are the next of kin. I, therefore, do not see that it is a very conclusive argument against his claim to say that the defendant turns out not to be in the position which he was supposed to hold. But then comes the question whether the Court can now, after such a lapse of time, and in the present state of the parties, make an order of this kind with justice to those concerned. The claim ought to have been put forward at the trial. If Williams had not relied upon his position as administrator, but had applied to the Court for leave to take his costs out of the estate, it would have made the order. Ought I now, in my discretion, in the present state of parties, to make such an order? The party originally entitled has become a bankrupt, and his assignee is not before the Court; that alone would prevent my granting the application. Again the parties who are interested in the estate of the deceased, have not been brought before the Court that they may litigate this question. The parties, therefore, before me are not such that I could make this order even if I were disposed to do so. In the absence of all legal claim on the

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part of Williams in the absence of his assignee and of his former attorney, and particularly having regard to the time when this motion is for the first time made, I must reject it with costs.

Attorneys for Samuel Williams: *Lovell, Son & Pitfield.*
Proctors for next of kin: *Pritchard & Sons.*

Feb. 28.

IN THE GOODS OF BATEMAN.

Administration—No one willing or able to take Grant as Next of Kin, or Person entitled in Distribution, or Creditor—Grant under 20 & 21 *Vict. c.* 77, *s.* 73.

An intestate died, owing debts exceeding in value his personal estate and effects. Gifts of money had been made to him during his life by C., a relative of his deceased wife, to enable him to keep up his establishment, and after his death his debts were paid by C. There were only two next of kin and persons entitled in distribution, and of these one renounced and the other was a lunatic, and his next of kin renounced on his behalf:—

The Court granted administration of the intestate's estate and effects to C. under the 73rd section of 20 & 21 Vict. c. 77.

THOMAS HUDSON BATEMAN, late of Halton Park, Halton, in the county of Lancaster, esquire, died on the 11th of November, 1869, leaving a will, dated the 4th of September, 1861, wherein he appointed his wife sole executrix and universal legatee. She predeceased him, and he died a widower. The only persons entitled in distribution to his personal estate and effects were Agnes Tolson, spinster; Ann Tolson, spinster; and William Tolson, his lawful cousins-german once removed, and only next of kin. Agnes Tolson died on the 23rd of February, 1870, without having taken out administration, but having made her own will, and thereof appointed her sister, Ann Tolson, executrix, who had duly proved it. Ann Tolson had renounced administration with the said will of T. H. Bateman annexed. William Tolson was, at the time of the death of T. H. Bateman, and still remained, a person of unsound mind, and not likely to recover his reason; but no committee had been appointed of his personal estate.

T. H. Bateman was tenant for life of a small freehold estate called Halton Park, in the county of York, where he resided, which, upon his death, passed to his wife's nephew, Major John

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Underwood Champain, of the Royal Engineers, under certain deeds of family arrangement executed by the said T. H. Bateman and Julia Margaret his wife. The only property over which he had any disposing power, or which passed under an intestacy, was his furniture and household effects, and the arrears of rent due at his death. Some years prior to his death Major Champain had rendered himself responsible for any sum which it might be necessary to expend for the proper maintenance of T. H. Bateman's establishment over and above the income derived from his estate; T. H. Bateman being then of a very advanced age, and his mental faculties having to a great extent failed him, and his income being small. On his death it was discovered that his debts exceeded the value of his personal estate. Schedules of the personal estate and of debts were filed, from which it appeared that the value of the personal estate was 838*l.* 1*s.* 3*d.*, whilst the debts amounted to 972*l.* 19*s.* 4*d.* Major Champain had paid all the debts out of his own money, and taken assignments of them. Major Champain, who is now in India, had nominated Thomas Leach, of Lincoln's Inn, barrister-at-law, his attorney for the purpose of taking administration with the said will annexed.

Feb. 21. *Dr. Spinks, Q.C.* (*Searle* with him), moved for a grant of administration, with the will annexed, of the personal estate and effects of the deceased to the attorney of Major Champain, under the 73rd section of the Probate Act.

There is no other person to whom the grant can be made, for one of the next of kin has renounced, and the other is a lunatic; and there is no creditor.

Goddard, for Mrs. Tolson, consented to the motion, both on her own behalf, and also as next of kin of the lunatic William Tolson.

Cur. adv. vult.

Lord Penzance. This is an application for a grant of administration under very peculiar circumstances. One of the next of kin of the intestate has renounced; and I gather that the only remaining next of kin, who is a lunatic, has also renounced through his sister, who is his next of kin, so that none of the next of kin is ready to take the grant, and there is no one else entitled in distri-

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bution. Furthermore, there is no one who is a creditor of the estate, for it appears that the intestate was assisted during the latter part of his life by the present applicant, who was his wife's nephew, and that after the death of the intestate he paid off such debts as were outstanding, without any obligation to do so, but, as I presume, for the sake of the credit of the family. But being a volunteer, both as to the money he furnished the intestate during his life, and as to the money he applied in extinguishing the intestate's liabilities after his death, he does not stand in the position of a creditor. Thus there is neither a next of kin, nor a person entitled in distribution, nor a creditor to whom a grant can be made, although there are some assets, consisting of rents due and furniture, and a few small items of that kind. The difficulty I felt was, that the applicant could not put his right to the grant on any footing recognised by the practice of the Court. The terms of the 73rd section are, however, very general, and give the most extensive power to the Court to make grants under special circumstances to persons who would not, but for that section, be entitled to them. I think under all the circumstances, and looking at the peculiar condition of the estate, that the grant ought to be made to the applicant as prayed.

Attorneys: *R. S. Taylor & Son.*

May 4.

IN THE GOODS OF RICHARDSON.

Administration—Joint Grant to Persons entitled in Distribution and to Nominee of Next of Kin—Consent of Persons interested—Joint Grant refused— 20 *&* 21 *Vict. c.* 77, *s.* 73.

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The consent of all the persons interested is not a sufficient ground for departing from the general rules as to grants of administration. The Court therefore refused to make a joint grant under 20 & 21 Vict. c. 77, s. 73, to two of the persons interested in distribution, and to a nominee of the next of kin, although the next of kin and all the persons interested concurred in the application.

PETER RICHARDSON, late of the city of Durham, gentleman, died on the 5th of March, 1871, intestate, a bachelor, without a parent, leaving him surviving Elizabeth Appleby, his sister and only next

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of kin, and eight children of deceased brothers and sisters, together the only persons entitled in distribution to his personal estate and effects. The estate consisted of money in the bank, leasehold estates, furniture, and mortgages, of above the value of 20,000*l.* There were thirty different mortgages of the value of about 15,373*l.* Mrs. Appleby being eighty-one years of age, and not equal to the task of administering, desired that letters of administration should be granted jointly to her son John Appleby, and to the deceased's two nephews, Ralph Richardson and Robert Crowe. Mrs. Appleby, and all the other nephews and nieces had duly renounced and consented to the joint grant.

May 2. *Searle* moved, accordingly, for a joint grant to John Appleby, and Ralph Richardson, and Robert Crowe. The Court made a grant to the nominee of all the persons interested, who had himself no interest, in *Farrell* v. *Brownbill* (1); and it has frequently made joint grants with the consent of all the persons interested: *In the Goods of Grundy* (2). In this case the special circumstances in favour of the joint grant being made under the 73rd section, are the great age of the next of kin, the difficulty of managing an estate which consists chiefly of mortgages, the wish of the next of kin to have her interest protected in the administration of the estate, and the consent of all the parties.

Cur. adv. vult.

May 4. LORD PENZANCE. This was an application for a joint grant of administration to two of the persons entitled in distribution, and to a third person nominated by the next of kin. It was conceded that such a grant was contrary to the practice of the Court, but the Court was asked to exercise the power vested in it by the 73rd section, and to make the grant for the convenience of the parties. Two cases were cited, in one of which a joint grant was made to the next of kin and the only other person entitled in distribution, who was equally interested; and another, where an administration suit had been instituted and several members of the family disputed the grant, and the parties announced to the Court

(1) 3 Sw. & Tr. 467; 33 L. J. (P. M. & A.) 185.
(2) Law Rep. 1 P. & D. 459.

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that they wished to abandon the litigation, and consent to the appointment of a third person without interest as administrator. The Court granted that application under the 73rd section. But the Court cannot make the grant which is now asked for under that section without materially laying down the rule, that whenever the parties interested like to consent that some person nominated by them shall take the grant, it will make the grant to such nominee. If all suitors in this court, and persons entitled to grants, were persons of intelligence and knowledge of business matters, such a rule might be unobjectionable. Persons of intelligence and education, knowing their own rights, may be allowed without objection to transfer to third persons their right of dealing with property in which they alone are concerned. But the Court must bear in mind that suitors and persons entitled to grants in this court are many of them persons who have no opportunity of knowing their own rights, and are not aware of the dangers that may beset them if they transfer those rights to other persons. It would, therefore, be unwise of the Court to depart from the old-established rule, that a grant of administration must be made to the person who is by law entitled to the property. That rule is the basis of the practice that has been acted on by the Ecclesiastical Courts for centuries; it is a sound rule, and by departing from it the Court would introduce a practice the laxity of which might lead to dangerous consequences. I therefore decline to make the grant on that ground.

Then comes the question whether there are in this case any such special circumstances to justify an exceptional grant under the 73rd section. I can find no such circumstances, and the application simply rests on the ground that the parties interested consent to it. I therefore reject the application.

Attorneys: *Johnson & Coote.*

IN THE GOODS OF BELL. 1871

Double Probate—Property sworn under different Amounts—Practice. *March* 14.

One of two executors proved the will, swearing the property (the amount of which depended on the result of a pending suit in Chancery) under a certain amount, and paying the duty thereon. The other executor was allowed to take probate, swearing the property under a smaller amount.

ANNE MARIA HAWKESLEY BELL, widow, deceased, died on the 28th of July, 1870, leaving a will and two codicils, of which she appointed Captain Robert Charles Clipperton and Mr. Frederick Henry Cartwright executors. In December, 1870, probate of the will and codicils was granted to the said F. H. Cartwright, power being reserved to the other executor. The property was sworn under 60,000*l.* by Cartwright, and the probate duty of 750*l.* on that sum was paid.

By an indenture of May, 1870, the testatrix conveyed all the property therein mentioned to trustees, and a question having been raised as to the validity of that indenture, a suit was pending in the Court of Chancery for administering the trusts thereof. Captain Clipperton had been advised that it was essential for the purposes of the said suit that he should take a grant of probate of that will and codicils. In the event of the deed being held to be valid, the personal property of the deceased would be under 2000*l.*, but in the event of its being invalid, it would be under 60,000*l.* Captain Clipperton had been further advised that he might be prejudiced in the suit by swearing the property under 60,000*l.* instead of under 2000*l.*

Dr. Spinks, Q.C. (*Searle* with him), moved that probate might be granted to Captain Clipperton, with leave to swear the property under 2000*l.*

Inderwick opposed the motion, on the ground that the other executor Cartwright might be prejudiced in the Chancery suit if it were granted.

LORD PENZANCE. The applicant believes that the value of the estate does not exceed 2000*l.*, and he wishes to swear it under that

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amount, although the other executor has sworn it under 60,000*l*. The only question is, whether the revenue is secured against loss, for the sole object of swearing the property under a certain amount is to secure the payment of the stamp duty. In this case the duty has already been paid on the larger sum, and there is, therefore, no difficulty in the matter. But the Court expresses no opinion of any kind on the question of the validity or invalidity of the deed, for it has no information on the subject, and it is unnecessary to inquire into it. Negative words will be inserted in the order, shewing that the Court formed no opinion on the matter.

Motion granted, without prejudice to the question of the validity of the deed.

Attorneys for Captain Clipperton: *Kimber & Ellis.*
Attorneys for Cartwright: *Belfrage & Middleton.*

March 11.

HITCHINS AND ANOTHER *v.* EARDLEY AND ANOTHER.

Evidence—Declaration—Legitimacy—Admissibility of Declaration of the Person whose Legitimacy is the question at issue—Practice.

In an administration suit, the only question at issue before the jury was, whether M. D., through whom the defendants claimed, was legitimate. The defendants, after producing primâ facie evidence of the legitimacy of M. D., tendered his declarations in evidence. The plaintiffs objected to the admissibility of these declarations, and tendered evidence on the voir dire for the purpose of shewing that the declarant was not a member of the family. The Court being of opinion that the defendants had made out a primâ facie case of the declarant's legitimacy, admitted the evidence of the declarations, and rejected the evidence on voir dire tendered by the plaintiffs.

MARY ADAMS, late of Colbridge, in the county of Stafford, spinster, died on the 29th of October, 1869, leaving a will and codicil, wherein she appointed her two sisters, Sarah Adams and Ann Adams, both of whom died in her lifetime, executrixes and residuary legatees. The plaintiffs claimed administration with the will and codicil annexed, as the lawful second cousins, and two of the next of kin of the deceased. The defendants claimed the grant as the lawful cousins and sole next of kin of the deceased, and alleged that they were natural and lawful children of Murhall Daniel, and that

Murhall Daniel was a natural and lawful child of James Daniel, and Lucy his wife; and that the said Lucy Daniel was the lawful aunt of the deceased Mary Adams. The only question on which issue was joined was whether Murhall Daniel was the natural and lawful child of James Daniel and Lucy his wife. This issue came on for hearing before Lord Penzance and a special jury.

The defendants began, as in the event of their claim being established, the plaintiffs could have no right to the grant. In the course of the defendants' case, a question was raised as to the admissibility of certain declarations made by Murhall Daniel, the person whose legitimacy was in question. These declarations were both oral and in writing.

Huddleston, Q.C., (*Dowdeswell, Q.C.*, *Macnamara* and *Pritchard* with him), for the defendants, tendered evidence of the declarations.

There is sufficient primâ facie proof of the legitimacy of the declarant to render his declaration admissible.

H. Matthews, Q.C. (*Dr. Tristram* with him) for the plaintiffs, proposed to call evidence on the voir dire, for the purpose of shewing that the declarant was not a member of the family; and objected to the admissibility of the declarations, until the evidence for the plaintiffs had been taken on the voir dire.

LORD PENZANCE. I am not aware that the question has ever been raised in the same form. The rule of law on the subject is perfectly plain. It is that when a witness is called to give evidence of the declarations of a person whose connection with the family is in question, the judge is to decide whether this connection is established. It is obvious the application of this rule must lead to some practical difficulties, where the person whose declarations are tendered and objected to is also the person whose legitimacy is the question in the suit, and the Court must do its best to meet those difficulties in a practical way. The defendants propose to give evidence of declarations of the person whose legitimacy is in dispute, and it is suggested by Mr. Matthews that, in order to determine whether these declarations are admissible, the Court ought to have the whole of the evidence in the suit on both sides. The

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effect of taking that course would be to postpone the reception of the evidence of these declarations until all the rest of the evidence in the case had been produced, and then practically to hear the whole of the evidence over again, together with those declarations. I do not know that a verdict, founded on evidence given on the voir dire, would be sustainable, so that both sides would have a right—not only to call all their evidence on the voir dire, but to call it over again on the issue before the jury. This shews the inconvenience of the course suggested by the plaintiffs' counsel. It is impossible to lay down an abstract rule on the subject, for each case must be determined by its own facts. There is some degree of evidence in the case as it now stands that the declarant was a member of the family. The question is whether enough has been done by the defendants to make out a sufficiently strong primâ facie case of the declarant's legitimacy. It can only be a primâ facie case, because it will be impossible to come to any conclusion until the other side has been heard. It cannot be denied that a strong primâ facie case has been made out, and I think it will be better that I should at once admit these declarations, for the purpose of having the whole case laid before the jury. The jury will understand that they will ultimately have to form their own opinion upon the matter, in the full light of the whole of the evidence. I think the ends of justice will be better served by taking this course than by taking the course suggested by Mr. Matthews, because what I now say as to the declarant's connection with the family is said on imperfect evidence, before the full evidence in the case has been produced. Therefore nothing that falls from me in this early stage of the case can in the slightest degree affect the opinion of the jury. I rule that I am sufficiently satisfied of the declarant being a member of the family for the purpose of admitting the declarations, and I reject the evidence tendered by the plaintiffs on the voir dire.

The jury ultimately found a verdict for the defendants.

Attorney for plaintiffs: *Mackenzie.*

Proctors for defendants: *Pritchard & Sons.*

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April 18.

IN THE GOODS OF HONYWOOD.

Probate—Omission of offensive Paragraph of Will—Practice.

The Court of Probate will not order the omission from the probate, and from the copy of a will to be inserted in the books in the registry, of a paragraph of such will, on the ground that it makes a false charge against, or is offensive to the feelings of, an individual.

ROBERT HONYWOOD, late of Waterloo Place, Pall Mall, Middlesex, died on the 25th of December, 1870, having made a will dated the 12th of June, 1868, in which he appointed Walter Honywood and Thomas George Graham White executors. The will concluded as follows: "Lastly, it is my most sacred wish that the brief 'Honywood *v.* Honywood,' 1859, should be kept in the family, and handed down to all ages as a witness of the terrible iniquity which has robbed me of my birthright, and blotted out the Essex branch of Honywood for ever, and by which F. E. H. did most deliberately and designedly defraud me and my heirs of our patrimony and inheritance for ever. I hereby record my most solemn conviction that my poor brother, the late W. P. Honywood, was perfectly unconscious and innocent of what was done, and that he was simply an instrument in the hands of his wicked and remorseless wife. This is my last will and testament." The suit referred to was tried in the Probate Court in the year 1860, and the contested will pronounced for.

Searle, on behalf of the executors, asked the Court to direct that the above paragraph shall be omitted from the engrossment of the will for probate, and from the copy to be inserted in the registry books of the Court. They desired such paragraph to be omitted in order to avoid further ill-feeling in the family. He referred to *In the Goods of Wartnaby* (1); *Curtis* v. *Curtis* (2); *Marsh* v. *Marsh*. (3)

LORD PENZANCE. The whole thing is objectionable, for the probate professes to be a true copy of the will. How, then, can I

(1) 1 Rob. Ecc. 423. (2) 3 Add. 33.
(3) 1 Sw. & Tr. 528.

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order any part of the will to be omitted from it? After the cases cited it would be too strong to say that I have no power to do so; but it is a power to be exercised with great moderation, and in cases of a definite character. In the paragraph objected to there is nothing but a strong expression on the part of the testator that in a certain suit his adversary was wrong, and he was right. It is not likely that any one will feel hurt at the angry expressions of a disappointed litigant. It would be a great misfortune if the Court on light grounds should interfere in such a matter, and put before the world under its seal a document professing to be, but actually not, a true copy of the will. I reject the motion.

Attorneys: *Satchell & Chapple.*

April 18.

IN THE GOODS OF ARCHER.

Execution—Position of the Signatures of the Testator and Witnesses—15 & 16 *Vict. c.* 24.

A will was written across the second and third sides of a sheet of note paper, the lower part of such sides being left blank. The attestation clause and the signatures of the testator and witnesses were written at the back of the will, and therefore across the top of the first and fourth sides of the paper. The testator wrote the will in the presence of the witnesses immediately before he executed it:—

Held, that the will was well executed under 15 & 16 Vict. c. 24.

WILLIAM ARCHER, late of Upton St. Leonards, Gloucestershire, miller, died on the 11th of February, 1871. On the 1st of February, 1866, the deceased requested John Archer to witness his will, which John Archer consented to do. The deceased thereupon wrote the whole of his will in the presence of John Archer and Mary Elizabeth Archer, declared the same to be his will, and requested these two persons to sign it as witnesses, which they did. By this will the deceased gave the whole of the real and personal estate to his wife, and appointed her sole executrix. It filled about six lines written across the second and third sides of a sheet of note paper, the lower halves of such sides being left blank. The attestation clause (which contained the signature of the deceased) and the signatures of the witnesses were written on the

back of the will, and therefore across the top of the first and fourth sides of the sheet. The next of kin, the children of the deceased, formally consented to probate being granted of this paper. 1871 IN THE GOODS OF ARCHER.

Dr. Tristram moved for probate accordingly, as the execution was sufficient under 15 & 16 Vict. c. 24. He referred to *In the Goods of Hammond.* (1)

LORD PENZANCE. In that case the attestation clause and the signatures of the deceased and witnesses were not on the same side as the writing of the will, and Sir C. Cresswell said that the execution would have been sufficient if he had had any evidence at all that anything had been written on the paper before the signatures were put there. In this case the deceased wrote his whole will in the presence of the witnesses. I think, therefore, you are entitled to a grant.

Proctors: *Brooks & Dubois.*

DIXON *v.* DIXON. *April* 25.

Matrimonial Suit by a Wife—Parties returned to Cohabitation—Motion to dismiss—Attorney's Costs unpaid—Practice.

A suit having been instituted on the part of a wife for a dissolution of her marriage, in which the husband had appeared and answered, an application was made on his behalf that the petition should be dismissed on an affidavit from the wife that the suit had been improperly instituted, and that she had returned to cohabitation.

The Court ordered such application to stand over until the wife's attorney had had an opportunity to tax his costs and enforce them against the respondent.

MRS. DIXON instituted a suit against her husband, John Burleigh Dixon, for dissolution of marriage by reason of adultery and cruelty, and he entered an appearance in such suit, and filed his answer to the petition. He now filed an affidavit made by his wife, in which she said that the suit had been instituted at the instigation of her father, Thomas Hamlin, in a hasty and ill-judged manner, and without due consideration; that upon reflec-

(1) 3 Sw. & Tr. 90.

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tion she had arrived at the conclusion that the petition could not be sustained, and consequently she had returned to and is now cohabiting with her husband, and is desirous that the petition should be dismissed.

Harmsworth now moved accordingly.

Dr. Swabey, on behalf of the attorney, who still continued on the record as attorney of the petitioner, opposed the motion. According to the practice the petition will not be dismissed until the wife's costs are paid: *Cooper* v. *Cooper*. (1)

THE JUDGE ORDINARY. This is an application to dismiss a petition presented by a wife against her husband. After the proceedings had commenced the parties came together again, and on that ground I am asked to dismiss the petition. The attorney for the wife maintains that it would be very hard upon him if I were to do so, because at present he has no order for the payment of his costs, and he is desirous to obtain an order for their taxation. I think the Court ought to hold its hands for the present; and I shall, therefore, direct this application to stand over for a fortnight; and in the meantime the attorney for the petitioner is authorized to file his bill of costs for taxation against the respondent.

Attorneys for petitioner: *Clarke, Woodcock, & Ryland.*
Attorneys for respondent: *Miller & Miller.*

(1) 3 Sw. & Tr. 392; 33 L. J. (P. M. & A.) 71.

ATKINSON *v.* HER MAJESTY'S PROCTOR. 1871 *May* 9.

Testamentary Suit—Undue Execution—Costs against the Queen's Proctor.

The Court of Probate has no authority to condemn the Queen's Proctor in the costs of unsuccessful litigation.

THE plaintiff propounded the will of Mary Henderson, of Redpath, Yorkshire, who died in May, 1870. The defendant pleaded that the will propounded was not executed in accordance with the statute 1 Vict. c. 26; that the deceased was not capable of executing a will on the day it bears date; and that the will was obtained by the undue influence of the plaintiff. These two last pleas were abandoned at the commencement of the trial, and after one or two witnesses had been examined the opposition of the Crown was withdrawn.

April 21. *Dr. Spinks, Q.C.* (*A. Charles* with him), applied to the Court to condemn the Queen's Proctor in the costs of the litigation. He referred to *Dyke* v. *Barton.* (1)

Sir R. P. Collier, A.G. (*Sir Travers Twiss, Q.A.*, and *Hugh Cowie* with him), opposed the application. He relied upon *Reg.* v. *Beadle.* (2)

May 9. LORD PENZANCE. In this case an application was made to me to condemn the Queen's Proctor in the costs of the litigation; and I intimated at the hearing that if I had any discretion in the matter I should exercise it in favour of the application. But I can find no trace of any principle, no decided case, and no statute which empowers me to make such an order. In the Common Law Courts it is invariably held that the Crown is not liable for costs; and, moreover, that the Crown is not bound by the provisions of any statute unless specially named in it. In special instances, and by special statutes, the Crown has been made liable to pay, and has been entitled to receive costs. On those occasions the Crown is specially made liable to costs in suits of a peculiar character. Such are the Excise Acts, and other Acts for the recovery of the revenue. This Court, however, has only

(1) 10 Moo. P. C. 458. (2) 7 E. & B. 492; 26 L. J. (M. C.) 111.

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power to make orders for costs under a modern statute, which contains no provision in reference to costs against the Crown. On general principles, therefore, I must hold that I am not armed with any power to make the order asked for; and I reject the application.

Attorneys for plaintiff: *Brooks & Co.*

May 2.

IN THE GOODS OF PETER BRAMES HALL.

Will—Codicil—Pencil Alterations in Will made before the Execution of Codicil not included in Probate.

The testator executed a will and codicil. At some time after the execution of the will, but before that of the codicil, he, with a pencil, struck through several paragraphs of his will, and made his initials on the margin; he also placed a query opposite other paragraphs. The codicil confirmed, in so far as it did not alter, the will:—

Held, that the alterations so made were only deliberative, and not final, and not included in the confirmation of the codicil, and, therefore, to be omitted from the probate.

PETER BRAMES HALL, of Ellerker House, Richmond, Surrey, died on the 17th of March, 1871. He executed a will on the 3rd of June, 1864, and a codicil on the 9th of March, 1871. By the will he appointed his wife Jane Hall, and his sons Thomas Farmer Hall, and John Frederick Hall, executors, and disposed of his interest in the premises in which he carried on the business of a gunpowder manufacturer in partnership with his brother. He also nominated certain persons to succeed him in the business. This will was drawn up by his attorneys, and extended over several sheets of brief paper.

On the 30th of June, 1870, the testator executed new articles of partnership with his brother, and on the 9th of March, 1871, a codicil to his will, in which, after reciting that by his will he had exercised a power of appointment over the business he carried on in partnership with his brother, which power was reserved to him in the deed of partnership, that such partnership had expired, and therefore the appointment was inoperative, and referring to the new articles, and the power given to him thereby, he appointed

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his son John Frederick Hall to succeed him, and to be sole executor as to his share and interest in the partnership. He also confirmed the appointment of executors in the will, and signified that he only intended to revoke his will so far as was necessary for the proper and effectual exercise of his power of appointment of a successor in the partnership. The will had at the time of its execution been sealed up in an envelope, and left in the possession of the deceased, but on his death it was found that the seal of the envelope had been broken, and a pencil line drawn through several paragraphs of the will, more especially those relating to the testator's interest in the business he carried on with his brother, and the appointment of his son John Frederick Hall executor. Opposite some of these paragraphs the testator had written his initials in pencil, and opposite other parts of the will he had put a query. These alterations were not on the will at the time of its execution, and although evidence was not forthcoming as to the precise time they were made, there was proof that it must have been antecedent to the execution of the codicil. After such execution the testator expressed his satisfaction at the act, and said he wished to go into the whole question of his will, but was not then strong enough. He had not the will before him on that occasion.

Bayford moved the Court for probate without the alterations in pencil made in the will. The rule is, undoubtedly, that a codicil republishes a will in the state it is in at the time of republication: *Neate* v. *Pickard.* (1) The Court, however, will look at the nature of the alterations, and judge whether the testator intended them as final, or only as a deliberative act. If he merely made the alterations preparatory to having a new will drawn up, the Court will not give effect to them: *Calamy* v. *Hyde.* (2)

LORD PENZANCE. I think the probate ought to go without the alterations in pencil. This Court will adhere to the doctrine which has been laid down in many cases, that where a codicil re-affirms a will the effect is that it gives validity to the testamentary dispositions to be found in that document. But it thus validates the dispo-

(1) 2 No. Ca. 406.

(2) 1 Lee Ecc. 423, n.

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sitions which are to be collected from the document as it stood at the time of the execution of the codicil, and not as it stood at any previous period. The question, then, in this case is, what were these dispositions—of what did the will consist according to the testator's intentions at the time he executed the codicil? Before the Wills Act it formed a frequent subject of discussion whether, as regards certain words and figures in a testamentary paper, the testator intended the bequest therein contained to be final, or merely deliberative. If, under all the circumstances, the Court considered that such words, although found in a testamentary paper, had not been written as a fixed testamentary disposition, but merely deliberatively, in order that the testator on further consideration, should determine whether or not they should be ultimately carried out, it rejected the words as part of the will. In this case the alterations are in pencil, lines are scored through certain paragraphs, and opposite others the word "query" is placed. This very fact of using the word "query" shews that the testator had no definite intention in doing what he did. The Court must exercise some discretion in the matter. It will see with what object alterations are made, and if in any way it can determine that they represent a definite intention of a testator it will adopt them, if satisfied that they were on the paper at the time of the execution of a codicil. These alterations are not of such a character. I am satisfied that the testator contemplated some further act to give them effect, and what he has done, therefore, is not sufficient to make them part of the will.

Attorneys: *Wilson, Bristow, & Carpmael.*

HULSE *v.* HULSE AND TAVERNOR. 1871

June 6.

Suit for Dissolution of Marriage—Decree Nisi—Intervention of Queen's Proctor —Plea of Adultery subsequent to Decree Nisi—Demurrer.

By 23 & 24 Vict. c. 144, s. 7, any one may shew cause why a decree nisi for a dissolution of marriage should not be made absolute by reason of material facts not brought before the Court:—

Held, that the Court is bound before making a decree absolute to take notice of any material facts not previously brought before it, even although they occurred subsequently to the decree nisi, and consequently of adultery subsequent to the decree nisi, for adultery before the decree absolute is adultery during the marriage, one of the grounds on which the Court may refuse to dissolve a marriage.

IN this case Samuel George Hulse petitioned for a dissolution of his marriage with Theresa Hulse by reason of her adultery with George Field Tavernor. To this petition the respondent did not appear; the co-respondent appeared, but did not file any answer. On the 1st of April, 1870, the Judge Ordinary made a decree nisi with costs against the co-respondent. On the 8th of November the Queen's Proctor obtained leave to intervene, and subsequently he filed his pleas. These pleas charged collusion, connivance, wilful separation, and conduct conducing to adultery, also cruelty, and that divers facts respecting the conduct of the parties material to the due decision of the cause had not been brought before or to the knowledge of the Court. In the particulars of these pleas was the following paragraph: "That the petitioner on divers days in the month of April, 1870, committed adultery with Arabella Downe at 79, Denbigh Street, Pimlico; and also, in the said month of April, and up to the present time, at 76, Denbigh Street, has habitually committed adultery with Arabella Downe." In January, 1871, the Queen's Proctor was ordered to amend his pleas by adding the above charge of adultery to them, and that having been done, the petitioner demurred, by reason that 23 & 24 Vict. c. 144, does not empower the Queen's Proctor to shew cause against a decree nisi being made absolute on the ground of adultery occurring subsequently to such decree nisi. Joinder in demurrer.

May 30. *Searle*, for the petitioner. The question is, whether the Queen's Proctor can shew cause against a decree nisi on the ground of

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adultery committed after such decree. Under 20 & 21 Vict. c. 85, the Court had no power to refuse a decree except for some reason stated in the Act. In the 31st section there is a proviso that the Court shall not be bound to pronounce such a decree if it shall find that the petitioner has, *during the marriage*, been guilty of adultery. At the time of the passing of that Act there was but one decree, and therefore the words *during the marriage* must have meant between the time of celebration of marriage and the date of the cause being heard. By 23 & 24 Vict. c. 144, s. 7, the Queen's Proctor, as one of the public, may shew cause against a decree nisi by reason of material facts not having been brought before the Court, i.e., at the hearing, and therefore the facts must have occurred before the decree nisi. There is nothing in this last Act to extend the powers of the Court to cases not included in the Act of 1857. Its intention is merely to introduce a system by which the Court shall be informed when its decree has been improperly obtained. A decree nisi properly given is conclusive between the parties, and as between them marriage and all marital obligations cease from that date. [He referred to *Stoate* v. *Stoate* (1); *Latham* v. *Latham and Gethin* (2); *Lewis* v. *Lewis* (3); *Laxton* v. *Laxton* (4); *Noble* v. *Noble and Godman* (5); *Prole* v. *Soady* (6).

Sir R. P. Collier, *A.G.*, and *Archibald*, for the Queen's Proctor. Under the 7th section (23 & 24 Vict. c. 144), at any time during the progress of the cause, or before the decree is made absolute, any person may give information to her Majesty's Proctor of any matter material to the due decision of the case, and the Queen's Proctor shall thereupon act under the instructions of the Attorney-General. There can be no matter more material to the due decision of this case than the one alleged, namely, that the petitioner has committed adultery. The bond of marriage continues until the decree is made absolute: *Chichester* v. *Mure* (7).

June 6. THE JUDGE ORDINARY. The 31st section of the ori-

(1) 2 Sw. & Tr. 384; 30 L. J. (P. M. & A.) 173.
(2) 2 Sw. & Tr. 299; 30 L. J. (P. M. & A.) 163.
(3) 2 Sw. & Tr. 394; 30 L. J. (P. M. & A.) 199.
(4) 30 L. J. (P. M. & A.) 208.
(5) Law Rep. 1 P. & M. 691.
(6) Law Rep. 3 Ch. 220.
(7) 3 Sw. & Tr. 223; 32 L. J. (P. M. & A.) 146.

ginal Divorce Act provided that the Court should not be bound to pronounce a decree if it shall find that the petitioner has *during the marriage* been guilty of adultery. The decree which the Court is thus declared not to be bound to pronounce is described as a decree "declaring the marriage to be dissolved." At the time this statute passed the making of this decree was a single act, and could be done only by the full Court of three judges. The subsequent Act, 23 & 24 Vict. c. 144, s. 7, provides that every decree for divorce shall in the first instance be a decree nisi, not to be made absolute till after the expiration of three months. The question then arises, in construing and applying the 31st section of the original Act, whether the word *decree* therein spoken of shall, since the passing of the subsequent Act, be read as applicable to the decree nisi or the decree absolute. In my opinion it should be read as applicable to both. There is no decree by which "the marriage is dissolved" until both have been pronounced by the Court. The two decrees are the beginning and ending of the same act, the one inchoate, and the other perfecting, or complete; a space of time being interposed to admit of inquiry. When, therefore, the Act (23 & 24 Vict. c. 144, s. 7), empowers cause to be shewn why the decree should not be made absolute, by reason of material facts not brought before the Court, I consider that the Court is bound to take notice of any material fact not previously brought before the Court, and it is not confined to the reception of facts occurring before the decree nisi. An ingenious argument was here raised on the words *brought before the Court*. It was said these words implied that the facts referred to were facts that could have been brought before the Court on some former occasion; and as the statute contemplated no former occasion but the trial which preceded the decree nisi, they must be facts which might have been then brought forward. If this reasoning be correct, adultery committed since the decree nisi is obviously excluded. But I see no reason so to narrow the meaning of the words *not brought before the Court*. Adultery since the decree nisi is not the less a *fact not brought before the Court* because from the date of its occurrence it was impossible that it should have been so brought before the Court. If, indeed, the words necessarily implied any shortcoming or default on the part of the

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petitioner, they would be confined in their application as contended. But there are no expressions in the statute from which such an implication can properly be drawn, and the Court is therefore bound to give them their natural and full interpretation. In thus construing the language of the two statutes, I am glad to think that, without violence to the language employed, I am able to work out the obvious intention of these enactments. For it can hardly be conceived that the legislature intended that a man or woman living in open adultery should be entitled to claim at the hands of the Court a decree absolute dissolving their marriage, though had the adultery taken place before the decree nisi it would have been fatal to their claim for relief. If, indeed, the argument could have been sustained, that the decree nisi puts an end to the marriage, there could be no adultery *during the marriage* after it. But there is no warrant, I think, for that proposition; as the marriage remains undissolved until the decree absolute is pronounced, the obligations of marriage in respect of adultery equally remain, and no reasonable ground can be assigned why the breach of those obligations should be fatal before the decree nisi, but innocent after it. These conclusions are, I think, rather in harmony than at variance with the decision of Lord Cairns in *Prole* v. *Soady* (1). It was there held that the decree absolute reflected back on the decree nisi in such a manner that, when pronounced, its effect on the subject then in question was the same as if it had been pronounced at the time the decree nisi was made, and that consequently, as Lord Cairns is reported to have said, "anything done in the interval was subject to the danger of being set aside by the decree becoming absolute." This method of reasoning is based upon the same view of the statutes which I have above explained, namely, that the two decrees are in truth but one act, inchoate at first in the decree nisi, perfected and complete afterwards in the decree absolute.

Attorney for the petitioner: *C. J. Vyner.*

(1) Law Rep. 3 Ch. 220.

SNOWBALL *v.* SNOWBALL. 1871

Matrimonial Suit—Issue of Fact to be tried at the Assizes—20 & 21 *Vict. c.* 85, *s.* 40. *May* 23.

The Court will not direct the issues of fact in a matrimonial suit to be tried in another court against the wishes of the husband, at whose cost the litigation is carried on.

Isabella Snowball petitioned the Court for a judicial separation from her husband James Snowball, by reason of his adultery and cruelty. The respondent denied the charges, and alleged misconduct on the part of the petitioner.

Dr. Swabey moved the Court to order the issues of fact to be tried at the next Durham Assizes, as all the material witnesses reside near Durham or at Newcastle-upon-Tyne. The respondent lives at Gateshead. He referred to 20 & 21 Vict. c. 85, s. 40, *Evans* v. *Evans and Robinson* (1), and *Richardes* v. *Richardes and Jones.* (2).

Dr. Tristram, for the respondent, opposed the motion on the ground that questions of law of an intricate character might arise on the defence set up by the respondent, who is desirous to have the assistance of counsel experienced in the practice of the Court. As the husband is liable for the costs of both parties, the difference of expense affects him only and not the petitioner.

The Judge Ordinary. The statute seems to give the Court power to send cases to be tried in the country, and therefore, under certain circumstances, the Court would exercise such power, but it must be done with discretion. It must be a strong case for the Court to exercise its discretion against the wishes of the husband, who pays all the costs; the sole object of the order being to save expense. Where the husband furnishes the funds to carry on the suit, he ought to be listened to in this matter. On many grounds it is advisable that a matrimonial suit should be tried here. The statute directs that the judge of this court in certain events shall dismiss the petition, and on a number of questions generally shall

(1) 1 Sw. & Tr. 216. (2) 30 L. J. (P. M. & A.) 48.

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exercise a discretion; but he cannot do so satisfactorily unless he sees the witnesses and hears the whole case. I have no doubt I have power, if sufficient reason be given, to make such an order; and, under proper circumstances, I should not be justified in refusing to avail myself of the powers of the statute. In this case the cause will be heard in this court.

Attorneys for petitioner: *Clarke, Son, & Rawlins.*
Attorneys for respondent: *Bell, Brodrick, & Gray.*

May 24.

HARRINGTON *v.* BOWYER.

Testamentary Suit—Undue Influence pleaded—Notice—Rule 41*—Costs.*

If the next of kin or others having a right to put executors upon proof of a will in solemn form of law, plead undue influence or fraud, they will be liable for costs, although they may have given a notice under rule 41 that they only intend to cross-examine the witnesses produced in support of the will.

JAMES BOWYER, of Tavistock Square, Middlesex, died on the 11th of January, 1871, having executed a will dated the 1st of September, 1862, in which he appointed the plaintiff Jane Harrington sole executrix. The plaintiff propounded this will, and the defendant pleaded that it was not executed in accordance with the provisions of the statute 1 Vict. c. 26, that the deceased was not on the 1st of September, 1862, of sound mind, memory, and understanding, and that the will propounded was obtained by the undue influence of the plaintiff; and with his pleas he filed a notice under rule 41 that he only intended to cross-examine the witnesses produced in support of the will. At the hearing no opposition was offered to the proof of the will, and the Court pronounced for it.

Dr. Spinks, Q.C. (*Searle* with him), for the plaintiff, applied to the Court to condemn the defendant in costs notwithstanding the notice. The rule 41 places next of kin as near as possible in the same position as they were in the Ecclesiastical Courts; but according to the practice of those courts they were liable to costs if they put interrogatories imputing fraud or undue influence and

failed to shew any ground for the charge. He referred to *Ireland* v. *Rendall.* (1)

Dr. Swabey, for the defendant, in opposition. The plaintiff has not been injuriously affected by this plea of undue influence.

[LORD PENZANCE. It was a charge it was necessary she should be prepared to meet, and would probably require her to produce additional evidence.]

The defendant ought to be liable only for the additional costs the plaintiff may have been put to by this plea. [He cited *Cleare* v. *Cleare.* (2)]

LORD PENZANCE. That case establishes the proposition, that where a party setting up a will has to prove affirmatively a fact, not merely to negative a charge made by his opponent, where the proof of such fact forms part of the burthen, which the party propounding the will takes upon himself, the other party may cross-examine the witnesses upon such matter without liability for costs, if the proper notice has been given. The question is, whether under the circumstances of this case, it is proper that I should exercise my discretion as to costs in favour of the defendant. I think the Court should be consistent in exercising its discretion; and as it has been already decided in *Ireland* v. *Rendall* (1) that under similar circumstances a party pleading undue influence is liable for costs, I shall follow that decision, and grant the application.

Attorneys for plaintiff: *Finney & Son.*
Attorneys for defendant: *Clark, Woodcock, & Roland.*

(1) Law Rep. 1 P. & M. 194. (2) Law Rep. 1 P. & M. 655.

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May 9.

WINDEATT *v.* SHARLAND.

Administration—Deceased a Pauper Lunatic—Guardians of Union—Creditors —12 & 13 Vict. c. 103, *ss.* 16, 17.

The deceased, at the time of his death, had been for many years supported at a county lunatic asylum as a lunatic, at the expense of the union to which he belonged. At that time he was beneficially interested in a sum of 400*l.* 3 per cent. consols, standing in the name of trustees. His sister, the only next of kin or person entitled to his property, was also a pauper lunatic. The Court held that the guardians of the union to which the deceased belonged were, under the provisions of 12 & 13 Vict. c. 103, ss. 16, 17, creditors of the deceased, and granted administration to them for the use and benefit of the lunatic next of kin.

Thomas Vinnicombe Sharland, of the County Lunatic Asylum, Exminster, Devonshire, died there on the 10th of March, 1870, intestate, leaving Elizabeth Harris Sharland, his sister, and only next of kin, the only person entitled to his property, who was also a lunatic, and inmate of the workhouse at Kingsbridge, Devonshire. The deceased had, at the time of his death, an absolute beneficial interest in 400*l.* 3 per cent. consols, standing in the name of trustees, and from the year 1845 had been an inmate of the Devon County Lunatic Asylum, at the charge of the board of guardians for the Totness Union. On the 24th of January, an application was made to the Court to grant administration of the property of the deceased to Mr. Windeatt, as the nominee of the board of guardians of the Totness Union, on the ground that they were creditors of the estate of the deceased; but the Court rejected the application. (1)

April 25. *Inderwick* renewed the motion. He referred to 12 & 13 Vict. c. 103, ss. 16, 17, which are to the following effect: Where, in the event of death, a pauper shall have in his possession, or belonging to him, any money or valuable security for money or property, the guardians of the union or parish wherein such pauper shall die may reimburse themselves the expenses incurred by them in and about the burial of such pauper, and in and about the maintenance of such pauper, at any time during the twelve months previous to the decease; and it shall be lawful for the guardians of

(1) Ante, p. 217.

any union or parish to pay the costs of the burial of any poor person dying out of the limits of such union or parish, who was at the time of the death in receipt of relief from such guardians, and that the cost of burying any poor person by or under the direction of any guardians or overseers, shall be recoverable in like manner and from the same parties as the cost of any relief (if given to such person when living) would have been recoverable.

LORD PENZANCE ordered the motion to stand over, in order that an affidavit should be filed, stating whether or not the county lunatic asylum at which the deceased died was locally situated within the union of Totness.

May 9. *Inderwick* renewed the motion, and the following order was made: The judge, having read the affidavits filed and heard counsel on behalf of Thomas White Windeatt the plaintiff, and in default of the appearance of Elizabeth Harris Sharland the defendant, the party cited, decreed letters of administration of the personal estate and effects of Thomas Vinnicombe Sharland, the deceased, in this cause to be granted to the said Thomas White Windeatt, as a person nominated for that purpose by or on behalf of the Board of Guardians of the Totness Union, creditors of the said deceased, for the use and benefit of the said Elizabeth Harris Sharland, a lunatic, the natural and lawful sister and only next of kin of the said deceased, during her lunacy, and until she shall be of sound mind, on giving the usual security.

Attorneys: *Vizard, Crowder, & Co.*

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June 20.

LYNCH *v.* THE PROVISIONAL GOVERNMENT OF PARAGUAY.

Interest Suit—Foreign Domicile—Right to grant of Probate or Administration—Succession to Property—Law of Foreign Domicile at time of Death.

Distinguished. STARKOWSKI v. ATT.-GEN. [1950] P. 135

The succession to property in England of a deceased foreigner is regulated by the law of his place of domicile as it existed at the time of his death.

A domiciled Paraguayan died in Paraguay, leaving personal property in England. After his death, but before a grant was made in England, a decree of the Government of Paraguay declared that all the property of the deceased, wheresoever situate, was the property of the nation of Paraguay. The Court held that, although by the law of Paraguay as existing at the time when a grant of probate of the deceased's will was applied for, the will might be invalid, the right to the grant, and the succession to the property must be governed by the law of Paraguay as it existed at the time of the death; and, therefore, that the Government of Paraguay had no locus standi to contest the validity of the will.

THE plaintiff claimed probate (as universal legatee) of the will of Francisco Solano Lopez, who died at Paraguay on the 1st of March, 1870. A caveat having been entered by the defendants, they were called upon to propound their interest, and they accordingly filed the following declaration:—

"1. That Francisco Solano Lopez, the deceased in this cause, was a native of Paraguay, and at the time of his death, which took place in Paraguay, on or about the 1st day of March, 1870, was domiciled there.

2. That by the law of nations, and by the law of England, the succession to the personal estate and effects of the said deceased, wheresoever situate, and also the right to administer to the said estate, is to be governed by the law of Paraguay.

3. That by a decree of the Government of Paraguay, dated the 4th day of May, 1870, all the property of said deceased, wheresoever situate, is declared to be the property of the nation of Paraguay, and that such decree is valid and now binding and operative by the law of Paraguay.

4. That by the now existing law of Paraguay, no will or testamentary paper whatsoever of the said Francisco Solano Lopez is entitled to probate, or has any validity whatsoever in England or elsewhere.

5. That by the now existing law of Paraguay, the said Government of Paraguay, or their officer, or attorney, is entitled to

become the sole personal representative in England of the said deceased, and to take the grant of letters of administration in England of his personal estate and effects situate in England.

6. That Richard Lees, the defendant, is by a power of attorney, duly executed by the President of the Republic of Paraguay on behalf of the said republic, dated the 22nd day of December, 1870, duly authorized to oppose the grant of probate of any testamentary document of the said deceased, and the grant of any letters of administration of the estate of the said deceased, to any other person, and to apply for letters of administration of all the personal estate and effects of the said deceased situate in England, to be granted to him under such power of attorney, and that he is by reason of the premises the only person entitled to be constituted the personal representative of the said deceased in England."

To this declaration the plaintiff demurred, and the demurrer came on for argument on the 4th of May, 1871.

Sir J. D. Coleridge, S.G. (*Sir T. Twiss, Q.A.*, and *Pritchard*, with him), for the demurrer. The ground on which the declaration is bad is, that it does not deny that the testator was domiciled in Paraguay, and that at the time of his death the will was valid by the law of Paraguay. If the plaintiff had applied to this court for probate immediately after the death, there can be no doubt the court would have been bound to grant it. The subsequent decree confiscating the property of the testator cannot affect the rights of his executrix. Even if such a decree would be held by a Paraguayan court to be retrospective and to invalidate the will—and it is doubtful whether it would be so held—there can be no doubt that the decree can have no such operation beyond the limits of the republic. An English court can take no notice of the confiscation by a foreign government of property situated in England.

[LORD PENZANCE. The Paraguayan courts can have no larger authority over Lopez dead than over Lopez alive. If he had 5000*l.* in the English funds, and, being alive, were to claim it, your proposition is, that he would be entitled to it, notwithstanding any decree of confiscation in Paraguay.]

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LYNCH v. PROVISIONAL GOVERNMENT OF PARAGUAY.

The effect of a criminal sentence does not extend beyond the territory of the country where it is pronounced. A decree of confiscation cannot affect property situated in a foreign country: Story's Conflict of Laws, c. xvi. s. 623.

Dr. Spinks, Q.C. (*Dr. Tristram* and *A. Brown* with him), for the declaration. The question is, whether the defendants have a locus standi to oppose the grant of probate. It may be that the Court of Chancery will hold, that even if the will be valid, the executrix has no right to retain the property, but holds it as the trustee of the Paraguayan Government. Our argument is, that by the now existing law of Paraguay no will made by Lopez is entitled to probate either in England or in Paraguay. Suppose that, after the death of a domiciled Englishman, an Act of Parliament were passed declaring that his property belonged to the State, and he had no power of disposing of it by will. In such a case the Queen's Proctor, on behalf of the Crown, would be entitled to a grant of administration in England, and, clothed with the authority of this Court, he would be entitled to a similar grant from the court of any foreign country in which the deceased had property. The foreign court would not inquire into the justice of the English Act of Parliament, but would follow the grant of the English court: *Laneuville* v. *Anderson and Guichard* (1); *Secretary of State for India* v. *Kamachee Boye Sahaba* (2); *United States of America* v. *McRae.* (3) There is no reported case exactly in point, but we rely on the general principle that by the comity of nations this Court will follow the law which governs the courts of the country in which the deceased was domiciled at the time of his death.

Sir J. D. Coleridge, S.G., in reply, cited *In the Goods of H.R.H. the Duchess d'Orléans* (4); Story's Conflict of Laws, c. xi. s. 473; ch. xii. s. 481.

June 20. LORD PENZANCE, having stated the declaration, said: To this declaration the plaintiff has demurred, and the ground of demurrer relied upon is, that the decree upon which the defend-

(1) 2 Sw. & Tr. 24; 30 L. J. (P. M. & A.) 25.

(2) 13 Moo. P. C. 22.

(3) Law Rep. 3 Ch. 79; S. C. Law Rep. 8 Eq. 69.

(4) 1 Sw. & Tr. 253; 28 L. J. (P. M. & A.) 129.

ants' claim is based is not alleged to have been in force at the date of the testator's death. Some other points were taken in argument raising a discussion of considerable interest; but, on reflection, I am satisfied that the date of the decree relied upon by the defendants is fatal to their claim in this suit. The general proposition that the succession to personal property in England of a person dying domiciled abroad is governed exclusively by the law of the actual domicile of the deceased was not denied; but it was affirmed by the plaintiff that this proposition had relation only to the law of the domicile as it existed at the time of the death of the individual in question, and that no changes made in that law after the date of the death can by the law of this country be recognized as affecting the distribution of personal property in England. This contention appears to me well founded. A general statement of the rule of law on this head is to be found in s. 481 of Story's Conflict of Laws. He says: "The universal doctrine now recognized by the common law, although formerly much contested, is, that the succession to personal property is governed exclusively by the law of the actual domicile of the intestate at the time of his death." The words "at the time of his death" are here carefully inserted as part of the principal proposition, and a long list of authorities is cited in support of that proposition, in none of which is any passage to be found indicating that those words are not a necessary part of it. But it was ingeniously argued that the decree in question has by the law of Paraguay a retrospective operation, and that, though the decree was, in fact, made since the death, it has by the law of Paraguay become part of that law at the time of the death. In illustration of this view it was suggested, that if the question were to arise in a court of Paraguay such court would be bound by the decree, and therefore bound to declare the provisions of the decree to be effective at and from the time of the death. This may be so; but the question is, whether the English courts are bound in like manner; or, more properly speaking, the question is, in what sense does the English law adopt the law of the domicile? Does it adopt the law of the domicile as it stands at the time of the death, or does it undertake to adopt and give effect to all retrospective changes that the legislative authority of the foreign country may make in that law?

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No authority has been cited for this latter proposition, and in principle it appears both inconvenient and unjust. Inconvenient, for letters of administration or probate might be granted in this country which this Court might afterwards be called upon, in conformity with the change of law in the foreign country, to revoke. Unjust, for those entitled to the succession might, before any change, have acted directly or indirectly upon the existing state of things, and find their interests seriously compromised by the altered law. As, therefore, I can find no warrant in authority or principle for a more extended proposition, I must hold myself limited to the adoption and application of this proposition, that the law of the place of domicile as it existed at the time of the death ought to regulate the succession to the deceased in this case. Under that law the present defendants have no locus standi to oppose any will the testator may have made, and no concern with his estate. The demurrer must therefore prevail.

I will only further observe, that if the decree upon which the defendants rely is one entitled to be recognized and enforced in this country in regard to the personal property of the deceased, the defendants' claim under it will be equally good, whether there is a will or not. It does not devolve upon this Court to adjudicate upon the property of the deceased, but only to ascertain whether he has made a good will; and, if not, to grant administration of his effects. The defendants would, in any event, therefore, have to establish their claim under the decree in the proper courts of this country before they can obtain the right to appropriate the property of which the deceased died possessed in England.

If it should there be held that this decree in Paraguay, penal in its character, and made after the death of the person to be affected by it, is one which the English courts will not enforce upon his personal property in this country, this Court will have done well in not permitting those who have no interest in the estate to provoke a litigation upon the validity of any will the deceased may have made. If a contrary conclusion should be arrived at, and the personal property of which the deceased died possessed shall be determined to have passed to the defendants by virtue of the decree upon which this decision arises, no will, however made, can operate upon it, and the proceedings in this

court can neither prevent nor retard the defendants in the acquisition of their rights.

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The Court accordingly pronounced for the demurrer, with costs.

Attorneys for plaintiff: *G. S. & H. Brandon.*

Attorneys for defendants: *Chappell & Son.*

IN THE GOODS OF ARTHUR, DECEASED.

June 27.

*Will—Execution—Clause added after Deceased had signed the Will, partly above and partly beside the Signature—*15 *Vict. c.* 24.

The testator, after signing his name to his will in the presence of two witnesses, added a clause to it, the writing being squeezed into the space above and beside the signature. Immediately afterwards the witnesses signed their names:—

Held, that the testator did not sign or acknowledge his signature to the will as containing such clause, and that probate should issue without it.

EDWARD PENFOLD ARTHUR, late of Mount Aboo, in India, a lieutenant-colonel in Her Majesty's Bombay Staff Corps, died on the 12th of June, 1870, at Tours, in France, having executed a will dated the 10th of April, 1864, in which he appointed his wife Emma Isabella Wilson Arthur sole executrix. In the will he gave his property to his wife absolutely, but just above the signature the following sentence in the handwriting of the deceased was inserted, such sentence also extending partly beside and below such signature: "On decease of my wife and marriage of all my children all property of every description to be sold and the proceeds invested as the guardians may think most advisable, and the interest equally divided among all my children." The surviving attesting witness, William James Moore, stated in his affidavit, that the deceased signed his name to the will in the presence of the deponent and of William Deeble, the other subscribing witness, since deceased; that after the deceased had so signed, but before the witnesses attested the will, the deceased added the last clause, and immediately he had completed it the attesting witnesses signed their names. The testator left seven daughters and one son, many of whom are under age.

Searle, for the executrix, moved for probate of the will, including

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the last clause. As regards position the clause would be admissible under Lord St. Leonards Act, s. 1, if it be not excluded by the last words of that section: "No signature under this Act shall give effect to any deposition or direction inserted after the signature shall be made." The interest of the widow is opposed to the insertion of the clause, but probably the Court will not omit it from the probate, unless all the parties are formally before it.

LORD PENZANCE. The object of the signature is to affirm what was before written. In this case the signature was written first and the clause afterwards, so the signature affirms nothing as to that clause. If after having written the clause the deceased had acknowledged the paper to be his will, that might have been an affirmation of the clause; but, according to the evidence, he neither signed nor acknowledged the will inclusive of the final clause. Probate will issue without it, but that will not prevent the parties interested from raising the question at some future time, if they shall be so advised.

Attorneys: *R. S. Taylor & Son.*

July 11.

IN THE GOODS OF ANN ELLIOTT.

Married Woman—Will—Desertion—Protection Order—20 & 21 *Vict. c.* 85, *s.* 21.

A woman having been deserted by her husband acquired some property by her own exertions, which she disposed of by will. Subsequently she obtained an order from the magistrates protecting her earnings and property:—

Held, that such order had a retrospective effect, extending back to the commencement of the desertion; and that the will was a valid instrument to pass the property acquired by her during such desertion.

ANN ELLIOTT, late of Milverton, Warwickshire, deceased, was married in the year 1831 to Richard Elliott, who is still living, but who deserted her in the year 1843. Between the years 1843 and 1867 the deceased, by her industry, accumulated property which was invested in shares and furniture, and on the 3rd of January, 1851, she executed a will by which she disposed of such property, and appointed Edmund Tomkins sole executor. On the 30th of

June, 1858, she obtained an order from the magistrates, protecting her earnings and property acquired since the commencement of the desertion.

Dr. Swabey moved for probate of the will to be granted to the executor. 20 & 21 Vict. c. 85, s. 21, enacts that if an order of protection be made, the wife shall, during the continuance thereof, be and be *deemed to have been* during such desertion of her, in the like position in all respects in regard to property and contracts, and suing and being sued, as if she had obtained a judicial separation. During the whole period of desertion she must be considered as a feme sole, and therefore she had a right to make a will disposing of her earnings and property.

LORD PENZANCE. It is obvious that the legislature intended that a married woman, from the moment of her desertion by her husband, should be treated as a feme sole, although the fact of desertion may not be brought to the attention of the authorities until some time afterwards. The order when made is retrospective in its nature; the property, therefore, acquired by the deceased during the whole period of desertion was her own, and she had a right to dispose of it by will. Probate may go.

Attorneys: *Field, Roscoe, & Co.*

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August 4.

NOBLE *v.* PHELPS AND WILLOCK. (HUTTON AND OTHERS CITED.)

Married Woman's Will—General Residuary Clause—Testatrix survived her Husband—No Re-execution—Speaking from Date of Death—Form of Probate.

The testatrix, when under coverture, executed a will in which, having disposed of certain property to which she was entitled for her separate use, she bequeathed the residue of the real and personal estate which she should possess or have power to dispose of at the time of her death to her niece. She survived her husband, who left to her considerable personal property, but she did not re-execute her will:—

Held, that although the Court may be of opinion that the language of the will of a woman made during coverture, taking it to speak and take effect at the time of the death of the testatrix, is sufficiently large to include the whole property of the deceased, it will not grant a general probate, but limit it in such a way as to leave the whole question as to the property affected by such will open to a Court of Equity without concluding or prejudicing the rights of any party.

The 24th and 27th sections of the Wills Act (1 Vict. c. 26) apply to the wills of married women in the same manner as to those of other persons.

MARIA DAWES, of 6, Hyde Park Gardens, Middlesex, widow, died on the 2nd of January, 1870. Her husband, Henry Dawes, died on the 17th of November, 1869, having made his will dated the 18th of August, 1857, in which he gave the whole of his real and personal estate to his wife, and appointed her sole executrix. On the 20th of July, 1869, Mrs. Dawes executed a will in which she appointed the defendants Maria Willock and William Phelps executors, and the material parts of which are as follows:—This is the last will and testament of me, Maria Dawes, the wife of Henry Dawes, formerly of Abingdon House, Cobham, in the county of Surrey, but now of No. 6, Hyde Park Gardens, in the county of Middlesex, esquire. Whereas I am entitled as my separate property to a sum of 3822*l.* 11*s.* 11*d.* consolidated 3 per cent. annuities standing in my name as the wife of the said Henry Dawes in the books of the Governor and Company of the Bank of England. Now in exercise of every right and power enabling me in this behalf, I hereby appoint and bequeath the said sum of 3822*l.* 11*s.* 11*d.* consolidated 3 per cent. annuities unto my executrix and executor hereinafter named upon trust, &c. . . And whereas under the will of my late father, William Noble, I became entitled to an estate in fee simple in a certain farm and lands known as

Mill Craggs Farm, situate in the parish of Bampton and county of Westmoreland. Now in exercise of every right and power enabling me in this behalf, I do hereby appoint and devise the same farm and lands with the appurtenances unto my husband the said Henry Dawes and his assigns during his life, and after his decease to the person or persons who at the time of my decease shall be my heir or heirs at law absolutely. And whereas under the settlement made on my marriage with my said husband I have a general power of disposition after the death of my husband in the event which has happened of there being no child of the marriage over the sum of 14,000*l.* thereby settled, and which is now secured on an estate at Highbury, in the said county of Middlesex. Now in exercise of the said power and of every other power enabling me in this behalf, I do hereby appoint and bequeath the said sum of 14,000*l.* to my executrix and executor hereinafter named, subject to the interest therein of my said husband for his life upon trust &c. . . And as to the residue of my real and personal estate, which I shall possess or have power to dispose of at the time of my decease, I appoint, devise, and bequeath the same subject as aforesaid unto my said niece Maria Willock, spinster, for her absolute use and benefit.

The executors, Maria Willock and William Phelps, by separate attorneys and declarations propounded this will, and Maria Willock further alleged in her declaration, 2. That at the time when the said will was executed, to wit on the 20th of July, 1869, the said Maria Dawes was the wife of Henry Dawes, since deceased, who assented to the said will, and to the dispositions therein contained, and never recalled his said assent thereto. 3. That after the death of the said Henry Dawes, which occurred on the 17th of November, 1869, the said Maria Dawes expressed her adherence to the said will and republished it. 4. That the said will was never revoked by the said testatrix, and that the same was and is valid and operative to pass to the said executor and executrix thereof all the real and personal estate of which the said testatrix was possessed and over which she had power of disposition and appointment at the time of her death, to wit on the 2nd of January, 1870. The plaintiff William Noble, in his pleas, first, admitted the due execution of the will propounded, but, secondly, denied that the husband had

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assented to the execution of the same, and to the dispositions contained therein, or that he had never recalled his assent; and further pleaded, thirdly, that admitting the said Henry Dawes assented to the said will and to the dispositions contained therein, and never recalled his said assent thereto, yet that the said will by the death of the said Henry Dawes, which took place on the 17th day of November, 1869, in the lifetime of the said Maria Dawes, was rendered void and of no effect as a testamentary instrument; fourthly, that he denies that after the death of the said Henry Dawes the said Maria Dawes expressed her adherence to the said will and republished it; fifthly, that he denies that the said will was and is valid and operative to pass to the said executor and executrix thereof all the real and personal estate of which the said testatrix was possessed and over which she had a power of disposition and appointment at the time of her death. The plaintiff further demurred to the third paragraph of Miss Willock's declaration by reason that the will of a married woman made since the statute 1 Vict. c. 26, with the assent of her husband, and which has become void by his death in her lifetime, cannot be rendered valid by a subsequent verbal recognition or republication on her part or otherwise than is prescribed by s. 22 of 1 Vict. c. 26. Miss Willock in her replication joined issue on the second, fourth, and fifth pleas of the plaintiff, and demurred to the third by reason that the will of a married woman made with her husband's assent is not revoked or rendered void and of no effect by his death. Joinder in the demurrers. Mr. Phelps, the other executor, declared in the same form as Miss Willock, except that he omitted the third paragraph, and the plaintiff pleaded to his declaration. On the 28th of April, 1871, the issues as to the facts were tried before Lord Penzance, who on the 9th of May decided that it resulted from the evidence taken in the cause, first, that the sum of 3822*l.* 11*s.* 11*d.* consolidated 3 per cent annuities disposed of by the will of the deceased propounded by the defendants was the separate property of the said Maria Dawes; secondly, that Henry Dawes, the husband of the said Maria Dawes, assented to her making a will and knew that she had made a will, which will is the will in question; thirdly, that it is not proved that the said Henry Dawes knew the contents of the said will; fourthly, that the said Maria Dawes after she became

a widow intended to adhere to the said will and intended that the same should operate and have effect as her last will and testament.

On the 11th of July the questions raised on the demurrers came before the Court for argument.

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Sir J. Karslake, Q.C., Wills, and *Searle,* appeared for Miss Willock, and contended that, in order not to fetter the action of the Court of Construction, this Court should make a general grant of probate of this will, as the most reasonable course, looking at the disposition contained in it. There is no actual incapacity in a married woman to make a will as to personal estate, but, nevertheless, she cannot legally do so; first, because she has nothing to dispose of, and secondly, because it may be prejudicial to the marital rights. Where, therefore, such an infringement is impossible, it is difficult to see how the principle can be applied. Again, a woman may execute a will with her husband's consent, even in his lifetime, and although the property disposed of by the will is absolutely his own, and such will is valid until the consent is withdrawn, and if his consent is given after her death it is irrevocable by him. But then it is said that if the husband dies in the lifetime of his wife, her will, although made with his consent, is thereby revoked. That, however, cannot be, because the Wills Act enacts that no will shall be revoked by change of circumstances, but only in the manner prescribed by the Act. As regards the will before the Court, it was valid in its inception; it was not revoked by the death of the husband, and did not require re-execution after that period. It relates to three classes of property, the deceased's separate estate, her interest under her marriage settlement, and the general residue of her personal property, which may include the property left to her by her husband. As regards the first, the will operates independently of the husband's assent, and would do so if he had expressed a dissent. As regards the property passing under the settlement, it is contended on the other side that that instrument only gave power to make a will in case the wife died in the lifetime of the husband, and that, therefore, the validity of this will, to affect that property, must be derived from the assent of the husband which lost its force on his death. As, however, the husband had no interest in that property, his assent to a will disposing of it was

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not required, or if it were it was given, and as that gave validity to the will at its inception it continued valid, and could not be revoked by his death. Again, as the will was validly made, the 24th section (Wills Act) applies, and it speaks and takes effect as if it had been executed immediately before the death of the testatrix, and therefore it passes the property which by the settlement became hers absolutely on the death of her husband. The same considerations apply to the residue, and the will will thus operate upon the property left under the husband's will. Lastly, we contend that no re-execution after the death of Mr. Dawes was necessary, in order that the will should operate on the whole property. By the terms of the 34th section (Wills Act) it must be assumed that republication, as distinct from re-execution, is still permissible in some cases; and, taking the 8th and 34th sections together, it is fair to conclude that one of such cases is that of a married woman who makes a will in the lifetime of her husband, and assents or adheres to it after his death. They referred to *Barnes* v. *Vincent* (1) *Paglar* v. *Tongue* (2); *Stevens* v. *Bagwell* (3); *Scammel* v. *Wilkinson* (4); *Stillman* v. *Weedon* (5); *Bernard* v. *Minshull* (6); *Rex* v. *Bettesworth* (7); *Thomas* v. *Jones* (8): *Morwan* v. *Thompson* (9); *Brenchley* v. *Lynn* (10); *In the Goods of Eleanor Reay* (11); *In the Goods of De Pradel* (12); Roper's Husband and Wife, vol. i. p. 170; Williams' Executors, pt. i. bk. ii. c. 1, s. 2.

Sir J. D. Coleridge, S.G., and *Inderwick*, appeared for Mr. Phelps, the other executor.

Manisty, Q.C., Dr. Spinks, Q.C., and *Dr. Tristram*, for the plaintiffs, contended that a married woman is testable only to a certain extent; and as regards the property passing under the settlement and the residue of her estate, it becomes a serious question whether the deceased has disposed of them by the will in dispute. If the Court makes a general grant of probate, the next of kin will be

(1) 5 Moo. P. C. 201.
(2) Law Rep. 1 P. & M. 158.
(3) 15 Ves. 139.
(4) 2 East, 552.
(5) 16 Sim. 26.
(6) Joh. 276; 28 L. J. (Ch.) 649.
(7) 2 Str. 891.
(8) 2 J. & H. 475; 31 L. J. (Ch.) 732. On appeal, 1 D. J. & S. 63; 32 L. J. (Ch.) 139.
(9) 3 Hagg. Ecc. 239.
(10) 2 Rob. Ecc. 441.
(11) 4 Sw. & Tr. 215; 31 L. J. (P. M. & A.) 154.
(12) Law Rep. 1 P. & M. 454.

(0)SC 5 Jur NS. 932.

(0)SC 8 Jur NS. 1124. 9 Jur

precluded from raising the question as to the extent of the residuary clause in the will. All the authorities agree that before the Wills Act a married woman was not testable except in certain cases; first, where she had an express power to make a will, and secondly, where her husband assented, and only to the extent of his assent. And as regards the assent, it was necessary to and at the time of probate, and therefore became inoperative on the death of the husband in his wife's lifetime against her next of kin. The Wills Act (s. 8) retains the incapacity, except as to such wills as might have been made before the passing of the Act, and that incapacity is not removed by the 24th section. In order that this section shall operate upon a married woman's will, it must be *re-executed* after the death of the husband. A mere recognition is not effective; there must be a publication in conformity with the law. Before the Wills Act a re-publication was an act which made the will a new will from the date of the re-publication, and that effect cannot be produced under the Act except by re-execution. The grant ought to be limited to such property as the deceased had power to dispose of. They referred to *Price* v. *Parker* (1); *Trimmell* v. *Fell* (2); *Long* v. *Aldred* (3); *Miller* v. *Brown* (4); *Hobbs* v. *Knight* (5); *In the Goods of R. Smith* (6); *Chatelain* v. *Pontigny* (7); *In the Goods of Lucy Wollaston* (8); *Roberts* v. *Roberts* (9); Williams' Executors, pt. i. bk. ii. c. 1, s. 2; Jarman on Wills, c. 3.

Fry, Q.C., and *Bevir*, for the parties cited.

Cur. adv. vult.

Aug. 4. LORD PENZANCE. The questions arising in this case concern the will of a married woman, of which the Court is asked to grant a general probate to the executors. The next of kin do not deny that the will is entitled to probate, but contend that the probate should be limited. The will in question, bearing date the 20th day of July, 1869, was executed when the testatrix was under coverture, and by it, after disposing of certain property to

(1) 16 Sim. 198.
(2) 16 Beav. 537; 22 L. J. (Ch.) 954.
(3) 3 Add. 48.
(4) 2 Hagg. Ecc. 209.
(5) 1 Curt. 768.
(6) 1 Sw. & Tr. 125; 26 L. J. (P. M. & A.), 39.
(7) 1 Sw. & Tr. 411; 29 L. J. (P. M. & A.), 147.
(8) 32 L. J. (P. M. & A.) 171.
(9) 2 Sw. & Tr. 337.

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which she was entitled to her separate use, the testatrix bequeathed "the residue of the real and personal estate, which I shall possess or have power to dispose of at the time of my decease, to my niece Maria Willock." After this will was executed her husband died, bequeathing her considerable personal property. Shortly afterwards she died herself without having re-executed her will. In this state of things the main question argued before this Court has been whether in the events that have happened the testatrix can be held to have had any testamentary capacity in respect of the property which she derived from her husband. For the affirmative two points were made, which it will be convenient to dispose of before the main question is handled. First, that the will was republished by the testatrix after her husband's death. But I am clearly of opinion, that since the Wills Act nothing short of re-execution of a will itself, or the formal execution under the Act of some document which directly or impliedly affirms it, can be held to confer any new or further testamentary validity upon it beyond that which it derived from its original execution. Testamentary validity is by the 9th section of the Wills Act capable of being conferred alone by formal execution in the manner required thereby, and there is no subsequent section or provision by which this enactment is qualified. Reliance was placed in argument upon the word *republished*, which is to be found in the 34th section. That section enacts that wills made before a certain date shall be exempted from the operation of the Act, and then goes on to declare that if a will is *republished* it shall be deemed to have been made at the time of such republication. So that if a will had been made before the Act, and republished after, it was to be held to have been made after the Act, and to require a formal execution. The object of this section was to get rid of republication as a method of conferring testamentary validity even as regards a will made before the date of the Act, and not to extend the operation of republication to wills made since the Act. The other point made was based on the husband's assent. The evidence in the case satisfied the Court that the husband did give a general assent to his wife's making a will. He knew at the time she made it that she was doing so, and was content that she should, though he was not proved to have been cognizant of the contents of her will, or to have assented to its provisions. It is needless to

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inquire how far this state of facts would have affected the validity of her will if he had survived her; for he died first, and this event appears to me, according to the authorities on this subject, to have extinguished once for all whatever support, authority, or efficacy his wife's will might have derived from his concurrence. The law is stated in Roper's Husband and Wife, vol. i. p. 170, and in the last edition of Williams' Executors, p. 53, and is cited with approbation by Sir C. Cresswell in *In the goods of R. Smith.* (1) Moreover, in the case of *Miller and Ross* v. *Brown* (2), a married woman's will made with the assent of her husband, who pre-deceased her, was held valid by reason of what amounted to republication, which would have been unnecessary if the husband's assent had availed. I pass, therefore, to the main question, which I conceive may be thus stated. Does the will of a married woman made during coverture speak and take effect with reference to the property comprised in it, as if it had been executed immediately before her death in this sense—that the will operates upon all property over which the testatrix had a disposing power at the time of her death, though she may not have had that power at the time of making her will? The case of *Price* v. *Parker* (3) is conclusive to shew that the statute does not confer on a married woman the power to make a will. There the wife had a power of appointment over certain property in case she died before her husband. Whilst her husband was yet living she made her will. At this time the event, upon the occurrence of which alone a power of appointment was conferred upon her, had not happened, and indeed it never did happen, for her husband died first. Consequently the will was inoperative; and so said the Court. "The effect of the 24th section of the Wills Act," said the Vice-Chancellor, "is not to make that valid which was invalid in its inception, but to give a rule for the construction of a valid testamentary instrument." The nature and extent of the operation which the 24th section of the Wills Act has upon the will of a married woman appears to me to have been settled and defined by the very able judgments delivered in the case of *Thomas* v. *Jones* (4),

(1) 1 Sw. & Tr. 125; 27 L. J. (P. M. & A.) 39.
(2) 2 Hagg. Ecc. 209.
(3) 16 Sim. 198.
(4) 2 J. & H. 475; 31 L. J. (Ch.) 732; 1 D. J. & S. 63; 32 L. J. (Ch.) 139.

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a case which was fully and ably argued first before Lord Hatherley as vice-chancellor, and again upon appeal in Chancery before Lord Westbury. In that case this was the state of facts: a married woman had made her will during coverture and died without re-executing it. Her husband survived her. At the time of the execution of her will, she was the contingent donee of a power of appointment; that is to say, a power of appointment had been conferred upon the survivor of three persons, of whom she was one, and of whom she eventually turned out to be the survivor. Her will contained no distinct appointment referring to the power or any specific gift of the property which was the subject of the power. But it did contain a general residuary devise. The testatrix therefore continued under the disabilities of coverture up to the time of her death. On the other hand, before her death, but after the making of her will, she became by survivorship the donee of a power of appointment of which the general residuary devise in her will was, if the 27th section of the Wills Acts could be resorted to, a sufficient exercise. It seems to have been considered indeed by Lord Westbury, but not by Lord Hatherley, that a will made by the testatrix before she became the survivor would independently of the statute have been a good execution of the power if conceived in apt language for the purpose. But this he said it was not necessary to decide, as the language of the residuary devise was too general so to operate. For the purpose of deciding the case, therefore, both these learned judges were of opinion that the testatrix at the time when she made her will had no disposing power over or in relation to the property in question, though she acquired such disposing power before her death. And in this state of things they both held that by force of s. 24 of the statute her will must be considered to take effect as if made immediately before her death, that at that time she had full power of disposition over the property in dispute, and that her will in consequence effectually disposed of it. Now I observe that both the learned judges appear from their observations to guard themselves from the conclusion that by so deciding it was intended to be asserted that what is called the *testamentary capacity* of a married woman would be increased or enlarged by the statute. If by *testamentary capacity* is meant the right and power to make a valid will, it is a

power that admits of no degree—it can neither be enlarged nor narrowed—a person either has it or has it not, and that it is not conferred by the statute I have already pointed out. On the other hand, if the words *testamentary capacity* be referred to the property, which in any individual case is capable of being disposed of by will, it is obvious that such a capacity will vary and increase with the extent of property over which the individual may acquire from time to time, and from any source, a disposing power. Understanding the words in this sense, it is, I think, impossible to affirm that the effect produced by s. 24 as it was applied by the Court in the case of *Thomas* v. *Jones* (1) was anything short of an enlargement of the testamentary capacity of the testatrix, not indeed by directly conferring an enlarged capacity upon her, but by referring the date of her will to a time when she possessed that enlarged capacity from another source. Lord Westbury puts it thus: "To render, however, the will of Margaretta, made in 1838, a valid appointment by way of devise of the estates in question under the statute, it is still necessary that Margaretta should have had at the time of her decease full power and right to make such a testamentary appointment without the aid of the statute. This she undoubtedly had, and her will by being made to speak at the time of her death still depends for its operation on the extent of her then existing testamentary authority." And Lord Hatherley says, "The statute makes a will operate as if executed immediately before the death, and the effect of this is, in the case of a married woman, that she must be regarded as a married woman executing the instrument immediately before her death, and passing thereby everything of which at the time of her death she had acquired a power of disposing." The substance, therefore, of what was in this case affirmed I take to be, that ss. 24 and 27 apply to the wills of married women in the same manner as to those of other persons. That consequently the will of a married woman ought to be considered to speak and take effect as if executed immediately before death. That in so considering it, the disposing powers of the testatrix must be accepted such as they existed at that time. That if the result of thus regarding the will is to enlarge the extent of property upon which the will operates beyond that upon which it would

(1) 2 J. & H. 475; 31 L. J. (Ch.) 732; 1 D. J. & S. 63; 32 L. J. (Ch.) 139.

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have operated at the time it was made, this result would not be correctly described as conferring a validity upon the will other than that which it had by law without the statute, and consequently is not at variance with s. 8. If I were called upon, then, to apply these principles to this case, I should, as it seems to me to be warranted in holding, that the testatrix having full power over the property acquired from her husband at the time of her death, and having used language in her will sufficiently large to include it, has effectually disposed of that property. But the decision of this matter does not devolve upon this Court. I desire to conform to the spirit as well as the letter of the decision of the Privy Council in *Barnes* v. *Vincent*. (1) What this Court has to determine is whether the testatrix has made a good will. The capacity to make a will is of course involved in that proposition; but when the question of that capacity arises out of and depends upon the disposing power of the testatrix over certain property, it is obvious that the same questions must afterwards arise in the Court of Equity. In such a case it is the duty of this Court to grant probate of the will, if valid in other respects, so as to enable the Court of Equity to adjudicate on that question. That the will in this case is valid and is entitled to probate was conceded in the argument. But then it is said that for the purpose of enabling the residuary legatees to sustain their claim in equity the probate ought to be general. If I were so to hold, I should create a difficulty in an opposite direction; for if the Court of Equity should determine that the property derived by the testatrix from her husband did not pass by her will her next of kin would be entitled to a cæterorum grant in respect of it; and this grant the Court would not then be able to make, having exhausted its authority in the issue of a general probate. For the purpose, therefore, of leaving the whole question open to the Court of Equity, and not concluding or prejudicing the rights of either party, I propose to make a grant in the following form, namely, limited to the administration of all such personal estate and effects as the said deceased, by virtue of the powers and authorities, if any, given to or vested in her by the indenture of settlement, or by virtue of all and every other power and authorities, or by virtue of

(1) 5 Moo. P.C. 201.

any law or statute her in any way enabling had power to appoint or dispose of by her will, and has by her said will appointed or disposed of accordingly, making at the same time to the next of kin a cæterorum grant of the remainder of her goods if any.

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Attorneys for plaintiff: *Routh & Stacey.*

Attorneys for defendant Miss Willock: *Wilde, Wilde, Berger, & Moore.*

Attorney for defendant Mr. Phelps: *Phelps, Bennett, & Woodford.*

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June 22.

Nullity—Incapacity of Woman—Practical Impossibility of Consummation—Absence of structural Defect.

The ground of the interference of the Court in cases of impotence is the practical impossibility of consummation.

In a case where the parties had cohabited for two years and ten months, and the man's capacity and desire to consummate were not questioned, the Court being satisfied of the bona fides of the suit, and of the practical impossibility of consummation, in consequence of the condition of the woman, pronounced a decree of nullity, although there was no structural defect in the woman.

THIS was originally a petition by Elizabeth G——, for a judicial separation on the ground of cruelty. The petitioner alleged a marriage, on the 17th of September, 1867, and cohabitation at a village in Yorkshire, where the husband, Richard G——, was in practice as a surgeon, and divers acts of cruelty during the cohabitation. The respondent, in his answer, traversed the charge of cruelty and alleged provocation. The 3rd paragraph was as follows:—

"That the petitioner has, ever since the 31st of May, 1870, without any just cause, refused and still refuses to live and cohabit with the respondent, and that ever since the marriage she has refused and still refuses to render him conjugal rights." And there was a prayer for a decree of restitution. The petitioner took issue on the allegations in the answer, and the case came on for hearing before the Judge Ordinary on the 16th of June.

The petitioner, Elizabeth G——, was examined and cross-examined, and in the course of the cross-examination she admitted

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that the marriage had never in fact been consummated. She had been examined by Dr. Farre and Sir W. Ferguson, who had recommended certain remedies, some of which she said she had adopted. But others she had refused to submit to on the ground that she thought them dangerous to her health and life. Dr. Farre stated that he had examined the petitioner at the request of her husband, and found no malformation or structural defect; but she was suffering from an excessive sensibility. This condition was generally temporary, and he had recommended soothing remedies such as morphia. Both the petitioner and the respondent were of middle age.

At the close of the petitioner's case, the Court gave leave to the respondent to amend his answer by alleging that the marriage had not been consummated by reason of the incapacity of the respondent, and by praying for a decree of nullity on that ground. The hearing of the cause was adjourned until the 22nd of June, when it came on before the Judge Ordinary in camerâ.

A. Staveley Hill, Q.C., and *Dr. Tristram*, were for the wife.

Dr. Spinks, Q.C., and *Searle*, for the husband.

The husband was examined and cross-examined. At the time of the marriage he was a widower with several children. He stated in substance that his wife had always manifested the greatest repugnance to conjugal intercourse, and had successfully resisted his attempts to consummate the marriage, and that she had refused to make use of the remedies prescribed by Dr. Farre, Sir W. Ferguson, and the other medical men who had at different times examined her, although he had made every effort to induce her to submit to them.

Dr. Partridge proved that he had examined Richard G——, and he was apparently well formed and competent to consummate. Mr. Barker, a surgeon residing near them, proved that Elizabeth G—— had spoken to him on the subject of conjugal intercourse, and said she very much objected to it, and it was very painful to her. She also suggested to Mr. Barker that she should have a separate bedroom; but that no further attempt should be made by Richard G—— to consummate the marriage.

Dr. Farre was recalled, and said in answer to questions put by

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the Court, "The result of my examination of Elizabeth G—— is, that in my opinion sexual intercourse is practically impossible. There are means by which, in my opinion, her condition may be remedied; but in order that they should succeed it is necessary that she should lend herself to them. If she were to return to cohabitation, and were to refuse to take chloroform and the other remedies prescribed, I think there could be no consummation. From my examination of the lady, and from the evidence I have heard in the case, I am strongly impressed with the belief that if they were to live together till the end of their days they would never consummate the marriage. Her condition is hysterical, and to a certain extent beyond her own control."

Dr. Spencer Wells, and Dr. Fitzpatrick, were called on behalf of Elizabeth G——, to prove that they had examined her recently, and found no structural impediment to connection.

Dr. Spinks, Q.C., and *Searle*, for Mr. G——. It is admitted that there has been no consummation, and that there is no defect in the man. It is substantially a case of incurable incapacity in the woman, for whether, as she represents, she cannot submit to the remedies prescribed, because they endanger her health and life, or whether, as he represents, she has refused altogether to submit to them, the result as far as he is concerned is the same: *D*—— v. *A*—— (1); Bishop on Marriage and Divorce, book iii. c. xiii. s. 240.

Staveley Hill, Q.C., and *Dr. Tristram*, for Mrs. G——. As it is clear that the defect is not incurable, the Court cannot pronounce a sentence of nullity.

The Judge Ordinary. I think it is desirable that I should at once state my opinion upon this case. The husband complains that the wife's physical condition is such that he has never been able to consummate the marriage. The evidence has established beyond all question the husband's capacity for marital intercourse, and the wife does not impugn it, and the question therefore turns entirely on the condition of the wife.

The Court is very solicitous in all cases of this kind to see that it is not imposed upon, because attempts are sometimes made to

(1) 1 Rob. Ecc. 279.

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get rid of the bond of marriage for reasons other than those alleged in these suits. The first question, therefore, always is as to the bona fides of the case. Now I am entirely satisfied of the bona fides of the present case. The application with which the Court is now dealing has in truth grown out of another suit. The parties quarrelled, and the wife having left the husband, charged him with cruelty, and instituted a suit against him on that ground. Without saying how far the charges are true, or how far they may be exaggerated, it is plain that these two persons lived most unhappily together, and it is also plain that their unhappiness was in a great measure caused by the state of things which prevented them from cohabiting as husband and wife. The husband was always desiring to have marital intercourse, and the wife was always refusing it. I am, therefore, satisfied of the bona fides of the case. It is free from all suspicion of being a suit trumped up for the purpose of getting rid of a marriage to which both parties are averse.

The next question is, what facts are established by the evidence? The main facts are proved beyond dispute. There is no doubt that this man and woman have lived together and slept together for two years and ten months. That is a material fact, because many difficulties of this peculiar nature, especially those which are associated with the moral feelings, pass away as time goes on. But here there has been nearly three years' cohabitation, and therefore ample opportunity has been afforded for any merely temporary difficulty to pass away. It sometimes happens that a nervous condition has prevented consummation at first; but such a condition would be removed in the course of time, and the length of the cohabitation therefore affords a strong basis for the conclusion at which the Court ought to arrive. It is unquestionable that these two people, neither of them advanced in life, have slept together for two years and ten months, and that the marriage has never been consummated. Without speculating on the abstract causes of this state of things, or on the remedies which might possibly be applied to it; but taking the case as it stands, the Court cannot help perceiving that there must be some strong cause rendering consummation impracticable. The question is, whether that cause is of such a character that it can practically be regarded as permanent.

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It is conceded that if the organs of the woman were so formed structurally as to render intercourse impossible, the marriage would be void. It is apparent enough that without sexual intercourse the ends of marriage, the procreation of children, and the pleasures and enjoyments of matrimony cannot be attained. The invalidity of the marriage, if it cannot be consummated on account of some structural difficulty, is undoubted; but the basis of the interference of the Court is not the structural defect, but the impracticability of consummation. If, therefore, a case presents itself involving the impracticability (although it may not arise from a structural defect) the reason for the interference of the Court arises. The impossibility must be practical. It cannot be necessary to shew that the woman is so formed that connection is physically impossible if it can be shewn that it is possible only under conditions to which the husband would not be justified in resorting. The absence of a physical structural defect cannot be sufficient to render a marriage valid if it be shewn that connection is practically impossible, or even if it be shewn that it is only practicable after a remedy has been applied which the husband cannot enforce, and which the wife, whether wilfully or acting under the influence of hysteria, is determined not to submit to. The question is a practical one, and I cannot help asking myself what is the husband to do in the event of his being obliged to return to cohabitation in order to effect the consummation of the marriage? Is he by mere brute force to oblige his wife to submit to connection? Every one must reject such an idea. If not, what is he to do? He has done everything that he could do. He had his wife examined by the most eminent medical men in the kingdom, and they recommended certain remedies. These remedies have been tried, not under the most favourable conditions, but under conditions as favourable as it can be expected that they ever will be tried. I see nothing in the evidence tending to shew that if they were to resume cohabitation to-morrow there would be any difference in the state of things that has existed for the two years and ten months of the previous cohabitation. Under these circumstances, I think that, taking a practical and reasonable view of the evidence, and freeing the case from technical rules as far as I reasonably can, the consummation

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of this marriage is practically impossible. No one can dive into the future and say that no change may hereafter take place in the woman; but the same remark applies even to a case of structural deformity. No one knows what may happen, for unforeseen things happen daily. Taking the evidence of Dr. Farre, who has perhaps a larger experience than any other man in these cases, and who says, "As far as I can form an opinion, I believe, as a scientific man, that if these two people should live together again, there will be no change for the better;" and as an unscientific person, entirely concurring in that opinion, I come to the conclusion that the consummation of the marriage is practically impossible. The case is certainly a very peculiar one; but I feel some degree of satisfaction in coming to the conclusion that the husband has established that practically the marriage can never be consummated, and therefore that he is entitled to a decree of nullity.

Attorneys for Mr. G——: *Williamson, Hill, & Co.*
Attorneys for Mrs. G——: *Lewis & Lewis.*

June 27.

WILSON *v.* WILSON AND HOWELL.

Matrimonial Suit—Rejection of Answer—Appeal—Suspension of Proceedings—Practice.

In a suit for dissolution of marriage the respondent filed an answer, merely denying the jurisdiction of the Court, and such answer was ordered to be taken off the files, unless within a limited time the respondent amended it by adding thereto an answer on the merits. She thereupon entered an appeal from such order. Notwithstanding such appeal the Court directed in what manner the petition, as unopposed, should be heard.

GEORGE JAMES WILSON petitioned the Court for a dissolution of his marriage with Mary Stuart Craigie Halkett Wilson by reason of her adultery with Archibald Howell. To this petition and the accompanying citation Mrs. Wilson appeared absolutely, but the co-respondent under protest. On the 4th of May, 1871, the respondent filed an answer in which she set out that the domicil of the petitioner and herself was and is Scotch, that the marriage and alleged adultery took place in Scotland, and that by reason of the premises the English Court for Divorce has no jurisdiction to

entertain the petition, or to grant the prayer thereof, and ought not to take cognizance of it. On the 30th of May the Judge Ordinary directed that the respondent should answer on the merits within a fortnight, otherwise that the answer she had brought in should be taken off the file. The respondent did not answer on the merits within the time limited, but appealed from the order to the full Court.

June 27. *Searle* moved for directions as to the mode of trial, notwithstanding the appeal.

Dr. Spinks, Q.C., and *Inderwick*, for the respondent, opposed the motion. Until the plea in bar has been disposed of it is quite unnecessary to go into the merits of the case, the proceedings ought to be suspended until the appeal is heard.

Bayford for the co-respondent.

THE JUDGE ORDINARY. This is an application for the direction of the Court as to the way in which the cause shall be tried. The object of the application is to expedite the suit. If the Court gives directions now, the matter may be disposed of next term. If it refuses to do, the application must be renewed next term, after the appeal has been determined, and after the allegations contained in the petition of the co-respondent have been investigated in this Court, and then the cause cannot be heard before next year. It is very right that this Court should, as far as possible, expedite causes, although it would be wrong to do so if thereby injustice were inflicted on any party. I cannot see that any wrong will be done by my granting this application. If the object of the respondent or co-respondent be not simply delay, the order will not prejudice either one or the other. The respondent appeared without protest, and then answered only to the jurisdiction. It was argued for the petitioner that the respondent could not do so, but must answer as to the merits. The Court held that the statement of facts as to jurisdiction might retain its place in the answer, provided the respondent combined with it whatever answer she had to make on the merits. From the order so made she has appealed. She has not accepted the opportunity the Court gave her to retain the facts on which she desires to raise a question of

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jurisdiction; and I therefore suspect her object is delay, for as she was allowed to set out those facts, she might at the hearing have disputed the jurisdiction as well as the merits. There seems to be no definite practice as to staying proceedings in this Court pending an appeal. If going forward with the steps of a suit pending an appeal were likely to be injurious to any one, the Court would not permit it to be done; but if not, I see no reason why it should not proceed up to a certain point. In the present case there seems to be nothing to justify a refusal to give directions as to the mode of trial. If the full Court admits the appeal, the respondent will of course go into the question of jurisdiction in the first instance; and even if the appeal be rejected I shall have no hesitation in listening to any application for leave to answer the respondent may be advised to make, so far as it is in accordance with justice. As to the co-respondent, I am at a loss to understand what injustice can be done to him by the order. The petitioner makes no claim against him for damages, and offers to surrender all claim for costs. If he had said, "You have made me a party to this suit, and brought serious charges against me, I claim a right to defend myself," I could quite understand his proceedings; but that is not so, he persists in remaining a party to the suit for the purpose of arguing that it never ought to be tried. Under these circumstances his right seems to amount to this: that he shall not be put to, or be liable for, any costs until a decision is given on his act on petition, and the question of jurisdiction is disposed of; but I see no reason why I should not direct the mode in which this cause should be tried.

Attorneys for petitioner: *Newman, Dale, & Stretton.*
Proctor for respondent and co-respondent: *E. W. Crosse.*

MILNE *v.* MILNE AND FOWLER. 1871 *Aug.* 4.

Dissolution of Marriage—Decree Absolute—Settlement of Property of the Respondent in Possession or Reversion—20 & 21 *Vict. c.* 85, *s.* 45.

Under the will of her father the respondent had a life interest to her separate use in certain property, unless she, being discovert, should do or suffer any act or thing, or any event should happen, whereby the same income, or any part thereof, should either voluntarily or involuntarily be aliened or incumbered, or be receivable otherwise than by herself personally, in which case the trust for her benefit was to be void, and such annual income was to be applied for the benefit of the respondent or her children at the discretion of the trustees.

On a decree for dissolution of marriage, the Court ordered a settlement to be made out of the respondent's life income derived under her father's will in favour of the petitioner and his children, but refused to extend the order to any moneys the trustees in their discretion might think proper to pay to her in case the substituted trust came into operation by reason of such order. Such a possibility of income is not property in reversion within the meaning of the statute.

ALFRED MILNE petitioned the Court for a dissolution of his marriage by reason of the adultery of his wife, Ellen Milne, with the co-respondent, Robinson Fowler. The questions at issue were tried before the Judge Ordinary and a special jury on the 8th of December, 1870, and a verdict given for the petitioner, with 1500*l.* damages. A decree nisi was thereupon made, and subsequently both the respondent and co-respondent were condemned in the costs. (1)

On the 3rd of May, 1871, Mr. Milne presented a petition praying the Court to vary the settlements made on the marriage of the petitioner and respondent, and to deal with certain property bequeathed to the respondent by her father. The latter part of the application was made under 20 & 21 Vict. c. 85, s. 45. The settlements referred to in the petition were dated respectively the 17th of April, 1854, and the trustees named under them were William Cunliffe Brooks, Thomas Brooks, the Rev. Nathaniel Milne, and Edward Chippendale Milne, since deceased. The will referred to in the petition was that of Samuel Brooks, of Whalley House, in the township of Withington, and city of Manchester, bearing date the 1st of November, 1861, and the bequest to the respondent was in the following terms:—The testator gave and devised certain estates, messuages, lands, rents, tenements, and

(1) Ante, p. 202.

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hereditaments to his trustees, William Cunliffe Brooks, James Dugdale, and William Norris, since deceased, in trust "to pay the net annual income of the same as and when the same shall from time to time become actually receivable, and not by way of anticipation, into the proper hands of my daughter for her separate use free from all marital control or interference as a strictly personal and inalienable provision during her life, unless or until she, being for the time being discovert, shall do or suffer any act or thing, or any event shall happen, whereby, notwithstanding the restriction on anticipation hereinbefore imposed, the same income, or any part thereof, shall, or but for the trust or provision next hereinafter contained, would either voluntarily or involuntarily be aliened or incumbered, or be receivable, otherwise than by herself personally, and for which annual income from and after the same shall from time to time become actually receivable, but not previously, the receipts of my said daughter, but her receipts alone, shall be sufficient discharges to the trustees or trustee for the time being; but if and whensoever she, being for the time being discovert, shall do or suffer any such act or thing as aforesaid, or any such event as aforesaid shall happen, then immediately from and after the doing or suffering or happening thereof the trust hereinbefore contained of and concerning such annual income for her benefit shall thereupon be void, and the annual income of the said hereditaments to accrue during the remainder of her life, when and as the several future payments thereof shall respectively from time to time accrue and be actually receivable shall be applied upon such trust or trusts, and subject to such restrictions and declarations, in favour or for the benefit of my said daughter, or any child or children and remoter issue of my said daughter, which child or children or issue may for the time being be alive when and as such several payments shall for the time being accrue and be received as aforesaid (and that whether such child or children and issue, or any of them, shall come into existence before or after the time when this present trust shall have come into operation), or for any one or more in exclusion of any other or others, of such objects as the trustees or trustee for the time being shall from time to time think proper; and so far as the same shall not be applied as aforesaid upon trust from time to time to pay or apply the said income to

accrue during the remainder of my said daughter's life in such manner as the same would, by virtue of the trusts and powers hereinafter contained, be payable or applicable if my said daughter were actually dead." On the death of his daughter the property so given to her for life was to be held on certain trusts for her children. By a codicil, bearing date the 1st of May, 1863, the testator substituted Thomas Harrop Sidebottom as executor and trustee in the place of James Dugdale.

On the 7th of June, 1871, an answer was filed on behalf of the respondent to this petition, and subsequently the registrar made a report to the Court in the matter, wherein, after setting out the provisions of the settlements and will referred to in the petition, he stated that there are now living seven children of the marriage; that Mrs. Milne, under one of the settlements, is in the receipt of an average annual income of 478*l.* 15*s.* 10*d.*, and under her father's will of an average annual income of 3182*l.* 10*s.* 10*d.*; and that the petitioner's income amounts to 1350*l.*, which includes the income derived from the investment of a sum of 5000*l.* bequeathed to the respondent, and paid to her under the will of her father, and also the interest arising from the investment of the accumulations of the separate estate of the respondent, amounting on the whole to £16,000, or thereabouts. Lastly, that it is proposed that under both settlements the Court should order the trustees to apply the income of the trust funds in the same manner as if the respondent were dead, and had died in the lifetime of her husband; and that, as regards the property under the will, that the Court should order that one moiety of the income arising from the property so devised and bequeathed to trustees for the benefit of the respondent shall be settled for the benefit of the petitioner and the children of the marriage of the petitioner with the respondent. No opposition was offered in reference to the proposals as to the settlements, but it was objected that the respondent had no such interest in the property affected by her father's will as can be made the subject of a settlement as property in possession or reversion under the statute 20 & 21 Vict. c. 85, s. 45.

Hawkins, Q.C., Kay, Q.C., and *Pritchard*, appeared for the petitioner. They admitted that if the order as to the income derived

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from the property passing under the father's will were made, the provisions in favour of the respondent in that will will be void, but she will still be entitled to a reversionary interest contingent upon the discretion of the trustees. As she has become discovert, the clause against anticipation has no longer effect, and she enjoys a life interest in the property, and a reversionary estate which she may assign for value. They asked that the one-half the income derived under the father's will should be paid to a trustee for the benefit of the petitioner and his children; and that, in case such order should have the effect of depriving the respondent of her direct life interest, they asked, further, that any moneys received by the respondent under the discretion given by the will to the trustees (not exceeding one-half the annual income) shall be paid over for the benefit of the petitioner and his children. The trustees must exercise their discretion under the control of the Court of Chancery; and even if they allowed no part of the income to the respondent, the object of this application would be obtained, because the effect will be to secure an additional income to the children. [They referred to White and Tudor's Cases in Equity, vol. i. p. 470, 3rd ed.; *Buttanshaw* v. *Martin* (1); *March* v. *March and Palumbo* (2); *Seatel* v. *Seatel* (3); *Cavendish* v. *Cavendish and Rochefoucauld.* (4)]

Sir J. Karslake, Q.C., Southgate, Q.C., and *G. Browne*, for the respondent. The 20 & 21 Vict. c. 85, s. 45, is only applicable where the respondent is entitled to any property in possession or reversion, and the settlement under it must be made for the benefit of the innocent party and the children of the marriage, or either or any of them. If this order be made, the respondent's interest under her father's will will cease, whilst the husband will get nothing. The income will become the absolute property of the trustees, with whose discretion in the disposal of it the Court of Chancery will not interfere, and who cannot exercise that discretion prematurely, but only from time to time as the income accrues and is received. The order, therefore, as it relates to the property in possession, cannot be for the benefit of the innocent

(1) Joh. 89. 5 Jur. N.S. 647
(2) Law Rep. 1 P. & M. 440.
(3) 4 Sw. & Tr. 230; 30 L. J. (P. M. & A.) 216.
(4) 38 L. J. (P. & M.) 13.

party or the children; and, as to the supposed reversionary interest, the respondent has none; she will merely become the object of the bounty of the trustees so far as they may think proper to pay her from time to time, as the income accrues, any portion of it. [They referred to *Godden* v. *Crowhurst* (1); *Joel* v. *Mills* (2); *Holmes* v. *Penney* (3); *Weller* v. *Ker* (4); *Stone* v. *Stone and Brownrigg* (5); *Sykes* v. *Sykes and Smith* (6); Lewin on Trusts, 5th ed. p. 439.]

Bayford, for the surviving trustees under the will.

Cur. adv. vult.

Aug. 4. THE JUDGE ORDINARY. The Court has no hesitation in this case in making the order which is usual in such cases, namely, that the trustees of the settlements shall pay and apply the income and proceeds of the property settled on the wife as if she were dead. The question of difficulty arises upon the property she derived from the will of her father. The circumstances of this case exhibit the conduct of both respondent and co-respondent in a most unfavourable light. The lady has a large fortune, and from an affidavit filed in the suit it appears that the co-respondent has speculated upon enjoying it. The petitioner has shewn great forbearance, and has several children to support. The Court is disposed to make an order in the husband's favour in respect of this latter property if it has the power. It can only deal with property to which the respondent is entitled *in possession or reversion*. Supposing the substituted trust created by the will in case of alienation or incumbrance to arise, it was ably and ingeniously argued that a possibility or probability would still exist that the trustees would appropriate some part of the income to the respondent, and that this possibility, or the funds which the trustees might apply to the use of the respondent, ought to be considered as property to which she was entitled in reversion. But by no reasonable application or interpretation of the words of the statute can it, in my opinion, be so regarded. This consideration, however,

(1) 10 Sim. 642.
(2) 3 K. & J. 458.
(3) 3 K. & J. 90; 26 L. J. (Ch.) 179.
(4) Law Rep. 1 H. L., Sc. 11.
(5) 3 Sw. & Tr. 372; 33 L. J. (P. M. & A.) 95.
(6) Ante, p. 163.

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does not alter or do away with the fact that the respondent has at present a life interest upon which the Court may make an order in the husband's favour; and I shall do so accordingly to the extent of 500*l.* a year. If the result of this order should turn out to be that the substituted trust will come into operation, the income of this large fund will at least be in the discretion of the trustees, and may probably be applied in part for the benefit of the children instead of being placed wholly at the mercy of the co-respondent and the woman with whom he has eloped.

Proctors for petitioner: *Pritchard & Co.*

Attorneys for respondent: *Pyke, Irving, & Pyke.*

Attorneys for the trustees under the will: *Norris, Allen, & Carter.*

Nov. 14.

GRIFFITHS *v.* GRIFFITHS AND GRIFFITHS.

Will—Execution—Attest and subscribe.

The deceased executed his will in the presence of two witnesses, who signed their names in his presence, one opposite the word "executors," the other opposite the word "witness." There was no attestation clause to the will. The deceased intended one of the witnesses to be his executor, and asked him to sign his name *in that character.*

The Court held, that such person did not sign the will exclusively as executor; but that he also intended by his signature to affirm that the deceased executed the will in his presence, and that consequently the execution was valid.

ISAAC GRIFFITHS, late of Five Ways, Cradley Heath, Staffordshire, deceased, died on the 18th of February, 1871. Sarah Ann Griffiths, the widow, as residuary legatee, propounded a will of the deceased bearing date the 8th of February, 1871. The defendants Edward Griffiths and John Griffiths, pleaded that such will was not executed in accordance with the provisions of the statute 1 Vict. c. 26, and they gave notice that they only intended to cross-examine the witnesses produced in support of the will. The will propounded was in form and substance as follows:—

"February the 8th, 1871.

"This is to certify that I, Isaac Griffiths, pork butcher, Five Ways, Cradley Heath, do leave all propertys and moneys be-

longing to me Isaac Griffiths, to my beloved wife Sarahan Griffiths, and at her death to my daughter, Jane Griffiths.

"Sined ×

"Excetrs. James Frederick Homer.

"William Tromans.

"Witness. Stephen Farmer."

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Stephen Farmer deposed, that on the 8th of February he saw the deceased, who was then ill in bed. The deceased sent him to Dudley for a will stamp. He returned from Dudley, and told the deceased that a stamp was not required, plain paper would do. The deceased told his wife to fetch some paper, which she did. The deceased then asked Mr. Homer, who was present, to write a will for him; but Mr. Homer said he had never seen or written a will, and did not understand it. The deceased asked him to write down what he, the deceased, told him. That was done. It was read over by deceased, who then called his wife to hold him up, which she did; and he made his mark. The deceased then gave the paper to Homer, and told him to sign his name, which he did, and then deponent signed his name. Deponent further said, that he saw deceased make his mark, and it was made in the presence of himself and Homer. The paper was afterwards sent to Tromans, who was not in the room; and when it was brought back deponent saw Tromans' name upon it. On cross-examination, he further said, he saw the word "executors" written. Deceased told Homer he wanted him to be one of his executors. He said so both before and after the will was signed. He wished to have two executors, Homer and Tromans. He understood Homer signed as executor by the desire of deceased. Referring to the word "witness," deponent added, he considered Homer as the other witness. He himself signed also as witness. It occurred about eight in the evening.

James Frederick Homer deposed that the body of the will and the word "excetrs." was in his handwriting; but he could not say whether he wrote the latter word before or after the deceased had made his mark. Deceased spoke to him about being executor as soon as he entered the room. Tromans was to be executor also. After deceased had put his mark, he told deponent to sign as executor, which he did. After Farmer had signed, deceased

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told the deponent to take it to Tromans, who was ill. Tromans signed his name, and deponent took the paper back to the deceased. Mrs. Griffiths also deposed that her husband told Homer to write his name as executor, and then gave the paper to Farmer to write his name as a witness.

Nov. 3. *Huddleston, Q.C., Dr. Tristram,* and *Loxdale Warren,* appeared for the plaintiff. The requirements of the statute have been satisfied. The deceased made his mark in the presence of two witnesses; who thereupon signed their names in his presence. Even if Homer signed his name as executor, he may also be taken to have signed it as a witness, to have attested the signature as the testator's signature to the will.

Ballantine, Serj., and *Inderwick,* for the defendants. On the face of the paper it is obvious that the will was not duly executed. The word "executors" in the plural stands opposite two of the names; "witness" in the singular, opposite the name of Farmer. It is clear, therefore, it was not intended there should be more than one witness. If Homer signed as executor only, under the misapprehension that it is necessary that an executor should do so, the will is invalid.

LORD PENZANCE. As no case has been cited on either side, I must take time to look into them, for it is advisable in these matters of execution, that the Court should follow the previous decisions. The statute requires the witnesses shall attest, and shall subscribe; if, therefore, a witness puts his name on the paper alio intuitu, it will not suffice. On the other hand, the Court ought not to be quick to conclude that, because the testator does not ask the witness in so many words to attest his signature, it is, therefore, not a good execution.

Nov. 14. LORD PENZANCE. I took time to consider whether, under the circumstances disclosed by the evidence, this will was duly executed. It is signed by the testator in the presence of two witnesses, and they both signed their names in his presence; but opposite the name of one of these witnesses, appears the word

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"executors" and opposite that of the other "witness" a third person afterwards signed his name, opposite the word "executors;" but that name was not written in the presence of testator. There is no further attestation clause. On the one side it was contended that the testator duly executed his will in the presence of two witnesses present at the same time, who subscribed in his presence; on the other side it is said the will was not duly executed; because one of the witnesses signed as executor only, and not as a witness to the execution of the will. I am inclined to think the question resolves itself into one of fact. Did he sign as an executor only, or as a witness also? I have tried to find cases in illustration of the proposition that it is necessary that a witness to the execution of a will shall sign as witness; but I have not met with any in point. The statute says, that the witness shall *attest*, and shall subscribe the will; which must mean that he shall put his name to the will as attesting the fact that he saw the testator sign it; that is, he must put his name as witness. In a case before me: *In the goods of Sharman* (1), I said, "When a testator has signed his name in the presence of two witnesses, and at his request they attest his signature, the execution is complete; and if a third person afterwards adds his name the Court will not come to the conclusion without cogent evidence that that third person signed as an attesting witness." I then investigated the question whether the third person signed as witness, or whether the execution was completed without his signature. Making the same inquiry in this case, I come to the conclusion that Homer did sign as witness. According to the evidence of Farmer, the deceased asked his wife to hold him up in bed; the deceased then signed with a cross, and told Homer to sign, which he did. Primâ facie from this evidence it would appear Homer signed as a witness. On cross-examination, Farmer said that Homer signed as executor and as witness also. It may have very well been that Homer was called upon to sign as witness as well as executor, and that he considered he signed in both characters. Homer himself gave evidence that the testator asked him to sign as executor; in cross-examination, he said the testator's words were, "he asked me to sign." The

(1) Law Rep. 1 P. & M. 661.

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Court is of opinion that Homer did not sign exclusively as executor; but that by his signature he meant to affirm that the deceased executed the will in his presence. Probate may issue. The costs of all parties to be paid out of the deceased's estate.

Attorneys for plaintiff: *Mackeson, Taylor, & Arnould.*
Attorneys for defendants: *Emmets, Watson & Emmet.*

Nov. 21.

IN THE GOODS OF G. H. FOSTER.

Will—Executor substituted.

The deceased, by his will, appointed his wife sole executrix, and, in default of her, two other persons to be executors. The wife took probate, and died:—

Held, that such other persons were, on the death of the wife, entitled to administer the estate of the deceased as substituted executors.

GEORGE HOLGATE FOSTER, late of The Holme, Regent's Park, Middlesex, died on the 1st of December, 1858, having made a will bearing date the 24th of July, 1857. In this will appears the following clause:—"I do hereby authorize my executrix, or executors hereinafter named, to continue any security or securities which I may die possessed of for any term in their discretion not exceeding five years from my death, notwithstanding any of the trusts aforesaid in this my will contained; and I nominate and appoint my said wife sole executrix of this my will, and, in default of her, I nominate and appoint the said John Knowles and Richard Foster to be executors of this my will; and I nominate and appoint my said wife, the said John Knowles and Richard Foster, and the said Christopher Procter trustees of this my will."

On the 23rd of December, 1858, probate of this will was granted to the widow, Maria Isabella Foster, who died on the 25th of May, 1871, leaving part of the deceased's estate unadministered. She made a will in which she named several executors, who took probate thereof on the 5th of July, 1871.

The draft of the deceased's will, prepared by his attorney, did not contain the appointment of John Knowles and Richard Foster to be executors, that was added by the deceased in copying out the

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will. John Knowles and Richard Foster were nephews of the deceased, and for many years before his death had been connected with him in business, and on his retirement carried on the business.

Dr. Swabey applied to the Court to decree probate to John Knowles and Richard Foster as the substituted executors named by the deceased in default of his wife. A default has arisen by the death of the wife. The executors of the wife consent to the motion. He referred to *In the Goods of Henrietta Johnson*, deceased. (1)

LORD PENZANCE. This is a question of construction as to what the testator meant when he said, "I appoint my wife sole executrix, and, *in default* of her, I appoint John Knowles and Richard Foster to be executors." John Knowles and Richard Foster were persons whom it was reasonable the testator should appoint as executors; but he chose to give a preference to his wife, as I understand the will, so long as she was able to act. The question is, whether the substitution was to take place only in the event of her not acting at all, or whether, as has happened, in the case of her death, after having taken probate. The Court will not construe the words of a will in a technical spirit, but will endeavour rather to carry out the real object of the testator. I think it is reasonable to hold that the testator intended that his wife should administer so long as she could, and that, in the event of her death either before or after taking probate, he substituted other persons. I am prepared to make the grant.

Attorneys: *Tatham & Procter.*

(1) 1 Sw. & Tr. 17; 27 L. J. (P. M. & A.) 9.

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June 6.

NEWSOME *v.* NEWSOME.

Dissolution—Effect of Agreement not to take Proceedings for Divorce—Adultery subsequent to Agreement—Condonation.

A wife knowing that her husband had been guilty of incestuous adultery with her sister, signed an agreement that she would forgive him, and would not take proceedings against him on account of such incestuous adultery, in consideration of his retirement from a then subsisting partnership in business with her father and brother. It was further agreed that they should not live together, but that they should see each other from time to time. The agreement also contained this clause: "The agreement or contract binds me (the wife) only so long as you remain true to me in love and duty." After the date of the agreement the husband was guilty of adultery, but not of incestuous adultery. The Court held that this subsequent adultery restored to the wife her right to have the marriage dissolved on the ground of the previous incestuous adultery.

Condoned incestuous adultery is revived by subsequent adultery not incestuous.

This was a petition by Elizabeth Newsome for a dissolution of her marriage with Peter Newsome, on the ground of his incestuous adultery with her sister. The petition alleged that the incestuous adultery was committed in February and March, 1868; that in July, 1868, the petitioner became aware of it, and separated from the respondent; and in 1869, since the separation, the respondent had on divers occasions committed adultery with other women. The respondent by his answer denied the adultery charged, and pleaded condonation.

The case came on for hearing before the Judge Ordinary without a jury on the 5th of April, 1871.

It was proved that the parties were married in February, 1862, and afterwards cohabited at Huddersfield, where the respondent, in partnership with the father and brother of the petitioner, carried on the business of provision merchants. In February and March, 1868, the respondent was guilty of incestuous adultery with the petitioner's sister. This came to her knowledge in July, 1868, and they separated. The respondent went to America for a short time, and a correspondence, apparently in affectionate terms, was kept up between him and the petitioner. After a short absence he returned to Huddersfield, and negotiations were then entered into between him and the petitioner with regard to a dissolution

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of partnership, which was very much desired by her father and the rest of her family. The respondent did not wish to retire from the partnership, but ultimately consented to do so in consideration of the sum of 1000*l.*, and of an agreement which was drawn up by him, and signed by him, and by the petitioner, and one of her brothers, on the same day, the 25th of November, 1868, as the agreement for the dissolution of partnership. The agreement was for a time kept secret from every one but the three persons who signed it. It was contained in two sides of a folded sheet of foolscap paper, and was in the following terms:—

I, Elizabeth Newsome, promise you, Peter Newsome, in presence of John Ward, forgiveness for all your past offences and irregularities whatsoever, and for which act of forgiveness you give up to me your interest and place in the business conducted at No. 9, Kirkgate, Leeds, or elsewhere, under the style or firm of Ward & Co. My brother John here present knowing I cannot hold a legal place in the firm in consequence of my being a married woman, solemnly promises you on honour that for five years ending December 31st, 1873, 25 per cent. of the profits shall accrue to me just as heretofore they accrued to you, as specified in the deed of partnership at present existing between Richard Ward, John Ward, and yourself. It is to be understood my father, Richard Ward, only agrees to me receiving the 25 per cent. above named for two years, and 15 per cent. afterwards, so long as I remain in the business; but my brother, John Ward, having regard to my past services, at your request, solemnly promises to secure to me the full interest above named if it lay in his power. I also, on my part, solemnly promise not to sue for a divorce from you, or legal separation of any kind, so long as you do not interfere with me or my property according to my moral right by virtue of this contract. For all the above-named advantages, and every other advantage not here named but understood amongst us, the said Richard Ward, Elizabeth Newsome, John Ward, and Peter Newsome, you relinquish your present position as a member of the firm of Ward & Co., as above named, for ever, and sign a deed legally dissolving such partnership as the forms of legal procedure dictate. I and my brother, John Ward, appreciate the sacrifice you make in relinquishing your hold upon a business you have done so much to establish, and would not ask this sacrifice had not you committed yourself so far as to make no other peaceable arrangement feasible. It is agreed that no announcement of the dissolution of partnership be made in the local newspapers, saving such as they may voluntarily copy from the official *London Gazette* in the ordinary manner.

Agreed to.
Signed and sworn to.

Elizabeth Newsome.
Jno. Ward.
Peter Newsome.

See over.

This was the end of the first side of the paper. The second side was as follows:—

Note.—The agreement, or contract, on page No. 1 of this sheet binds me only so long as you remain true to me in love and duty, and leave me sole mistress of

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my own affairs and actions in all respects as if I was still unmarried to you (saving, of course, that I do not marry again), all moneys belonging to me now in my own right, or coming to me in future from whatever source, shall be at my own absolute disposal; our child, Kate Helen, shall be under my control, and should you interfere against my wish with myself, my child, my money, or anything belonging to me, according to the spirit and wording of this arrangement, I am absolved from all herein solemnly sworn to. I, at your request, agree not to consult John Thackrah, solicitor, nor any other solicitor, neither will I entertain any advice or counsel respecting a divorce or other legal separation from you, but reject all approach of such advice or counsel as detrimental to the intention of this contract from whomsoever offered. It is agreed that all reproaches for past errors and mistakes be buried, and we covenant between us to refuse on any account to debate them. It is agreed that you do not permanently reside in Leeds or suburbs, nor enter into any business there against my wish, but that you go to work in some distant place, and exert your utmost endeavour to better your circumstances in life, and by a course of correct and consistent conduct and honourable regard to your position as my husband retrieve the position you have lost. The letters you wrote under distressed or violent feelings I solemnly swear never to use against you in any emergency. I promise I will employ my time for the future so far as I am inclined or able similarly to your desire in 1865, 1866, 1867 and 1868, viz., devote it to the business at No. 9, Kirkgate. As agreed upon then, so now will I continue to refrain from household work during the six days, and on Sundays take complete rest, just as if I belonged to the male sex, barring, of course, occasions of necessity. I do agree to permit you to visit me, say not more than once a week, reserving to myself the power to make the visit private or otherwise, and to limit it to thirty minutes if I am so disposed. I give you the hope of regaining me as an incentive to good and useful effort, but should I not be satisfied with your future conduct, this hope gives you no claim.

Signed and sworn to, { Elizabeth Newsome. Jno. Ward. Peter Newsome.

The petitioner and respondent met secretly from time to time in pursuance of the agreement, and a good deal of contradictory evidence was produced as to what occurred at these meetings, the respondent asserting and the petitioner denying that conjugal intercourse had taken place between them. The last meeting was on the 19th of April, 1869, and after that date the petitioner refused to see the respondent again, and on the 30th of May, 1870, this petition was presented. It was proved, and not denied, that in June, 1869, the respondent had been guilty of adultery with a woman at Huddersfield.

Hawkins, Q.C., and *Searle*, for the petitioner. There was no condonation, for even if there were conjugal intercourse (and it is submitted that the evidence disproves it), that does not necessarily

amount to condonation: *Keats* v. *Keats and Montezuma* (1). But, even assuming condonation, the offence condoned was revived by the subsequent adultery, although that subsequent adultery was not incestuous: *Dent* v. *Dent.* (2)

Inderwick, for the respondent. The conduct of the petitioner amounted to condonation, for she was bound by the agreement, and had no right to break it in April, 1869, by refusing to meet the respondent, as she had met him up to that time. The subsequent adultery, not being incestuous, did not revive the petitioner's right to complain of the incestuous adultery which she had condoned.

May 9. THE JUDGE ORDINARY. The question in this case was argued by counsel as one of condonation, but in the view I am disposed to take, the question is not whether the petitioner condoned, but whether, after by a written agreement she has bargained away her right to come to this court, this Court will permit her to throw aside that agreement and avail herself of the remedy to which she would, but for this agreement, be entitled. His lordship referred to *Rowley* v. *Rowley* (3); *Hooper* v. *Hooper* (4); *Buckmaster* v. *Buckmaster.* (5)

April 30. *Searle* (*Hawkins, Q.C.*, with him), for the petitioner. The Court will, no doubt, enforce a bargain that a wife will not, in consideration of some advantage given by her husband, take proceedings in this court for a matrimonial offence which, without such bargain, would entitle her to relief. But the Court must look at the circumstances of each case, and especially the terms of the bargain. The petitioner in this case signed her name to the agreement, which was drawn up by the respondent himself—and is in his writing—in order to spare her father the annoyance of continuing in partnership with the respondent, and the agreement should not be considered strictly against her. The two agreements must be read as one document; they were signed at the same time, and were evidently intended to form one agreement. The second part of the agreement contains an express stipulation that the first part

(1) 1 Sw. & Tr. 334; 28 L. J. (P. M. & A.) 57.

(2) 4 Sw. & Tr. 105; 34 L. J. (P. M. & A.) 48.

(3) Law Rep. 1 H. L., Sc. 63.

(4) 1 Sw. & Tr. 602; 3 Sw. & Tr. 251; 30 L. J. (P. M. & A.) 49.

(5) Law Rep. 1 P. & M. 713.

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shall not be binding on the petitioner if the respondent does not remain true to her. It is not, as in *Rowley* v. *Rowley* (1), an absolute release. The subsequent adultery of the respondent was a clear breach of the condition, and entitled the petitioner to institute this suit as if no agreement had been entered into.

Inderwick. The petitioner having obtained the advantage for which she bargained, namely, the dissolution of partnership, was bound by the agreement. But it was the petitioner, and not the respondent, who broke the agreement, for she refused in April, 1869, to continue the meetings for which he had stipulated. Up to that time he had performed all his obligations; and the agreement having been first broken by her, she is not entitled to rely upon his subsequent breach of it as restoring to her the right of instituting this suit.

Cur. adv. vult.

June 6. THE JUDGE ORDINARY. This is a case with regard to which I entertained some serious doubts. The incestuous adultery of the respondent was proved, and not denied. The contest between the parties turned on the issue of condonation, and considerable evidence was produced on the question whether what had taken place after the separation did or did not amount to condonation. The petitioner discovered the respondent's incestuous adultery some time in the summer or autumn of 1868. The respondent was at that time in partnership with her father, and she and her family were very anxious that he should be made to leave that partnership. The respondent left England for a time and went to America, and on his return negotiations were entered into, and the result was a written agreement, signed both by the petitioner and the respondent. By the terms of that agreement she was to forgive her husband for what had occurred, and to take no proceedings against him in the Divorce Court, but a condition was attached to this promise that he should remain faithful and true to her. There was also a provision that, although they were not to live together, she was to allow him to see her at certain stated times. During the latter part of 1868 and the beginning of 1869 the respondent did see the petitioner under this clause of the agreement on many occasions. These visits always occurred at

(1) Law Rep. 1 H. L., Sc. 63.

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some place where the petitioner was not known, and the respondent was, under the agreement, keeping away from the town where she and her family resided. The visits were continued during some months. A correspondence was put in which shewed very plainly that the respondent was constantly desiring to see more of the petitioner, and that she was desiring to see less of him. In April, 1869, the arrangement came to an end in consequence of the petitioner refusing to continue to meet the respondent. Some angry letters passed, and eventually this suit was instituted.

It seemed to me that, under these circumstances, the question of condonation did not arise at all. Condonation in its ordinary acceptation is a forgiveness by the wife implied from her restoring her husband to the original position which he occupied before the condoned offence was committed. When the husband is restored to his original position the law implies forgiveness, but forgiveness of a peculiar character, because it is coupled with the condition that the husband shall not in future be guilty of any marital offence. The whole doctrine of condonation—a very useful doctrine no doubt—is a structure of the Courts founded on the necessities of the case. But the question does not arise here, for the parties have entered into a written agreement, and whatever ground there may be for saying that the wife forgave the husband must be found in the agreement itself, which supersedes any presumption of law, and the conduct of both parties must be referred to that agreement.

But passing by that consideration for the moment, and dealing with the case as one of ordinary condonation, the question arises whether the conduct of the wife was such that the Court is bound to draw from it the conclusion of condonation. It seemed to be supposed that everything depended on the question whether there had been sexual intercourse between the parties. The bulk of the evidence on that question was quite contradictory; but if I were bound to come to a conclusion upon it, I should be of opinion that there was conjugal intercourse between them on the occasions when they met. That fact, without explanation, might perhaps—although I do not say it would—amount to condonation. Assuming, however, that there was condonation, the answer of the petitioner is complete. She says: "It is immaterial whether I did or

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did not condone the incestuous adultery committed in 1868, because my husband was guilty of adultery in 1869;" and the adultery in 1869 was proved, and not denied. In answer to this it was argued that incestuous adultery which had been condoned could not be revived by ordinary adultery. That depends on the condition which the Court implies in cases of condonation. When a wife condones a husband's incestuous adultery, what is the condition upon which the condonation is to protect him against a suit? The condition must be the same as in all other cases of condonation, namely, that the husband shall not be guilty of adultery or of any other marital offence. When incestuous adultery is condoned, I think the condition is not merely that the husband shall not again commit incestuous adultery, but that he shall be true to his marriage vows.

Having dealt with the supposed condonation, I recur to what I have already indicated to be the true question in the case, namely, the rights of the parties under the written agreement. The substance of the agreement, in the first sheet, is, that the petitioner will forgive the respondent and forbear to sue for a divorce, on the condition that he will retire from the partnership. This he did, either on the same or the very next day. He said he would rather give up his partnership than his wife, and he signed a deed of dissolution of partnership, receiving 1000*l.*, which probably did not represent the value of his interest in the business. He paid a price—and no doubt a considerable price—to obtain the agreement that she would not sue him in this court; and if the agreement had stopped there, it is quite clear that, independently of any question of condonation, the petitioner could not have been entitled to found a suit upon the incestuous adultery, for she had bargained away her right to do so, and the bargain was one which the Court would uphold. But the second sheet of the agreement, which was signed at the same time, begins thus:—"Note.—The agreement or contract on page 1 of this sheet binds me only so long as you remain true to me in love and duty," &c.; and it ends: "I give you the hope of regaining me, as an incentive to good and useful effort; but should I not be satisfied with your future conduct, this hope gives you no claim." The first sentence in this second page seems to me to be the most important part of the

agreement. It provides that the agreement contained in the first page shall only be binding on the wife as long as the husband remains true to her. Without saying what other condition these words may include, I think it would be impossible for the Court to hold that they do not include a condition that he shall not be guilty of adultery. I cannot say that the respondent, having been guilty of adultery, did remain "true to the petitioner in love and duty." I hold therefore that the husband, by his adultery in the summer of 1869, set the wife free from the agreement which she entered into in 1868, and, consequently, that she is entitled to a divorce on the ground of the incestuous adultery committed in 1868.

I am bound to add, that my mind has not been free from doubt on the case. The husband gave up a lucrative position on the hope held out by the wife that she would pardon him, and I cannot find that he did anything up to the time when she refused to continue to see him to forfeit his claim under the agreement, or to justify her in refusing to carry out the arrangement contained in the agreement. On the 19th of April matters were brought to a crisis; but up to that time the respondent had done nothing to justify her in the course she then took. But afterwards he committed adultery; and I feel bound to hold that his adultery deprived him of what would otherwise have been a good defence to the suit.

Decree nisi, with costs.

Attorneys for petitioner: *Blakeley & Beswick.*
Attorney for respondent: *J. B. Wheeler.*

1871
July 20.

IN THE GOODS OF MARY COUNCELL, DECEASED.

7 *Wm.* 4 *and* 1 *Vict. c.* 26, *s.* 33—*Legatee Married Woman—Husband survived her, but died in lifetime of Testator—Legatee's Representative.*

The deceased, a legatee under the will of her father, died in his lifetime, leaving issue living at his death. She also left a husband surviving her, who, however, died before the father, having made a will, in which he appointed executors who took probate of the same. The Court granted administration to the son of the deceased limited to the personal estate bequeathed to her by the will of her father, and dispensed with the renunciation or citation of the surviving executor of the will of the husband of the deceased.

THOMAS GOUGH, of Bedminster, Gloucestershire, gentleman, died on the 8th of May, 1848, having made a will, dated the 26th of June, 1844, in which he appointed Conrad William Finzell, Edward York Hazard, and James Howell, executors, who proved the same on the 17th of October, 1848. By this will he gave and devised certain premises in the city of Bristol upon trust as to one equal sixth part thereof, for his daughter Mary Councell, her heirs and assigns. Mary Councell, who was the wife of Thomas Inman Councell, died on the 14th of November, 1844, leaving her husband surviving her, and Thomas Inman Councell, Edward Gough Councell, Mary Ann Councell, and William Henry Councell, her natural and lawful children. Thomas Inman Councell, the husband of Mary Councell, died on the 14th of May, 1847, without having taken administration to the effects of his wife. He made a will dated the 24th of August, 1832, in which he appointed William Phillips, Thomas Foster, and George Powell, executors, who proved the same on the 9th of July, 1847, and George Powell still survives. Mrs. Councell, at her death, was not possessed of any personal estate, and the only estate and effects in respect of which administration is required, is the share of the deceased in the leasehold estates of the said Thomas Gough under his will, which share amounts to £155 16*s.* 8*d.* In order to complete the sale of such leaseholds, a representation to the deceased is required.

Dr. Spinks, Q.C., moved for administration to be granted to Edward Gough Councell, her son. The 33rd section, Wills Act (1 Vict. c. 26), enacts, that where a legatee being a child of the testator shall die

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in his lifetime, leaving issue, the bequest shall take effect as if the death of such legatee had happened immediately after the death of the testator. If that had been so in this case, Mrs. Councell would have died a widow, and her son would have been entitled to administration.

July 20. LORD PENZANCE decreed letters of administration of the personal estate and effects of Mary Councell (wife of Thomas Inman Councell, deceased), to be granted to Edward Gough Councell, the natural and lawful son, and one of the next of kin of the said deceased, on giving the usual security, limited so far only as concerns the share of the said deceased of and in the personal estate of Thomas Gough deceased, the natural and lawful father of the said deceased, bequeathed to the said Mary Councell by the will of the said Thomas Gough, deceased. The said Mary Councell having died in the lifetime of the said Thomas Gough, leaving issue living at the death of the said Thomas Gough. The said Thomas Inman Councell having survived the said Mary Councell, deceased, and died without taking upon himself the administration of her personal estate and effects. He further dispensed with the renunciation or citation of the surviving executor of the will of the said Thomas Inman Councell.

Attorneys: *Thomas White & Sons.*

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Nov. 21.

Will—Appointment of Executor—Latent Ambiguity—Parol Evidence.

The testator appointed as his executor his son Forster Charter. He had no son of that name, but two sons named William Forster Charter and Charles Charter.

The Court, on evidence of the circumstances under which the testator wrote the will, and of the position of the parties about him, and also on consideration of the contents of the will itself, determined that the latter was the person denoted by the will, and decreed probate to him.

It would seem that in such a case the Court may receive parol evidence of the intention of the testator.

FORSTER CHARTER, of Woodburn Hill, Northumberland, farmer, died on the 8th of August, 1869, having duly executed a will,

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bearing date the 23rd of June, 1859. The will was in the following terms:—

"I hereby nominate and appoint my son Forster Charter as the executor of this my last will and testament, and to him I give, devise, and bequeath all my messuages, &c., for his own use and benefit, and for the use and benefit of the persons hereinafter to be named. My will is, that my executor, Forster Charter, shall annually pay to Elizabeth, my wife, the sum of 10*l.* sterling, and at the same time allow my said wife her ordinary maintenance, so long as they reside together in the same house; but should they think proper to live separately, then my will is that, besides paying my wife the above-named annuity of 10*l.*, the said Forster Charter shall allow my said wife, rent-free, the use of the cottage at Woodburn Hill now occupied by Daniel Wood, and shall also supply her, gratis, with a reasonable quantity of bread, corn, potatoes, coals, butter, cheese, and garden produce. Also my will is, that should any difference of opinion arise between my said executor and my said wife with regard to the quantity or quality of the above bread, &c., the matter shall be laid before Walter Davison, shoemaker, and his decision shall be final. Moreover, my will is, that if my daughter Barbara Forster should at any time be sick or in want, my said executor shall afford her such pecuniary and other aid as she may require, and his own circumstances may permit, the kind and amount of aid to be determined upon by the above-named Walter Davison."

Probate of this will was granted on the 16th of September, 1869, to William Forster Charter, the elder son of the deceased, but such probate was called in by a citation dated the 24th of August, 1870, at the instance of a younger son of the deceased, Charles Charter, who claimed to be the person appointed executor in the will of the deceased. The deceased had had a son called Forster Charter, who died in infancy many years before the date of the will. At that time, and also at the time of his death, he had two sons living, William Forster and Charles, and an unmarried daughter, Barbara (in the will misnamed Barbara Forster). William Forster Charter was the elder son, and up to the year 1850 usually resided with his father. In that year he set up for himself as a butcher at Cleator Moor, Cumberland, about 100

miles from Woodburn Hill, and in 1853 he emigrated to Australia, from whence he returned in 1856, when he again established himself at Cleator Moor, and has continued to reside there from that time. He was never addressed or known by his father or family by the name of "Forster," but always as William. Charles Charter, the younger son, with the exception of a short period in 1859 and 1860, about the time the will was executed, lived with his father and mother at Woodburn Hill from his boyhood until his father's death, and worked for and assisted his father (without wages) in managing the farm. Affidavits were filed from members of the family and independent witnesses, setting out declarations of the testator made at the time of and subsequent to the date of the will, and almost to the day of his death, that Charles Charter was his heir, and that he had not left, and would not leave, anything to his elder son. The reading of these declarations was objected to on behalf of the defendant.

Dr. Tristram, and *Pritchard*, appeared for the plaintiff Charles Charter. [They referred to Wigram's Extrinsic Evidence, prop. 5; *Camoys* v. *Blundell* (1); *Douglas* v. *Fellows*. (2)]

Dr. Spinks, Q.C., and *Bayford*, for the defendant William Forster Charter. [They cited Jarman on Wills, 3rd ed. p. 401; *Doe* d. *Gord* v. *Needs* (3); *Doe* d. *Morgan* v. *Morgan* (4); *Jones* v. *Newman* (5); Williams on Executors, 6th ed. p. 1072; *Doe* d. *Hiscocks* v. *Hiscocks*. (6)]

Cur. adv. vult.

May 13th. LORD PENZANCE. The question raised in this case is somewhat peculiar. The deceased appointed as his executor his son, Forster Charter. It turns out that he had no son of that name; his eldest son was named William Forster Charter, his second son Charles Charter. It is beyond dispute, that evidence as to the circumstances under which the testator wrote his will, as to the different names and circumstances of the people about him, and other surrounding matters, is admissible in such a case. That is a principle laid down by Lord Abinger in *Doe* d. *Hiscocks* v.

(1) 1 H. L. C. 778.
(2) Kay, 114; 23 L. J. (Ch.) 167.
(3) 2 M. & W. 129.
(4) 1 C. & M. 235.
(5) 1 W. Bl. 60.
(6) 5 M. & W. 363.

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Hiscocks (1), so that I am at liberty to put myself in the position of the testator in order, from the surrounding circumstances, to judge under what state of things he wrote his will. Reading the evidence to this extent, it turns out that the eldest son, William Forster Charter, had ceased to live at home for many years, and that the younger did reside there until his father's death, and the will, in its provisions, clearly points to the fact that the executor at the time was living in the house with his mother. Moreover, the writer of the will has obviously confused himself with the name of Forster, for the daughter whose name, of course, was Barbara Charter, is called Barbara Forster. It was argued that in difficulties of this character the Court cannot look to evidence, especially parol evidence, of the intention of the testator or to declarations of his intention to leave the property to a certain person. I postpone the consideration of this question, for I think it is possible to come to a conclusion without such evidence. The testator appoints as executor his son Forster Charter, when there was no such person. It is argued, however, there was such a person, namely, William Forster Charter; but in law, if a man has several Christian names, they are all but one name; they constitute but one Christian name. And again, by what name does a man go? When the Court construes a will according to the intention of the testator, it must bear in mind, not only what name an individual had, but by what he usually went. The testator never spoke of his elder son by the name of Forster, but always as William. If the name had been Forster William instead of William Forster, there would be some reasonable ground for the argument that he is the person meant; or if the testator had named as executor his son William, the omission of the name Forster would not have been material, but it is impossible to conceive that he intended to describe his elder son by the name Forster Charter. If he had desired to make him a bequest, he would have done so in his usual name of William, and not in that of Forster. It is plain to the Court that what has been written is a mistake—a blunder arising out of the testator's own name. It is said, however, that as the deceased has made use of one of the names of the elder son, it must be assumed that he

(1) 5 M. & W. 363.

meant his elder son; but the description does not apply to the elder son either accurately or colloquially, as the father used to describe him. It is clearly a slip of the pen, and because the mistake takes the form of part of the Christian name of an individual, that circumstance will not settle the dispute in favour of that person. According to the rule laid down by Lord Abinger in *Doe* d. *Hiscocks* v. *Hiscocks* (1), it appears to me that the Court is able to admit parol evidence in this case. He said, "There is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise on the face of it is perfect and intelligible; but from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons (each answering the words of the will), the testator intended to express." In this case the ambiguity arises from the double description, "my son, Forster Charter." To part of this description each of two persons answers; to the other, *Forster Charter*, neither. Lord Abinger went on to say, referring to certain cases, "they do not materially vary in principle from those last cited. They differ, indeed, in this, that the equivocal description is not entirely accurate; but they agree in its being (although inaccurate) equally applicable to each claimant; and they all concur in this, that the inaccurate part of the description is either a mere blank, or applicable to no person at all. These, therefore, may fairly be classed also as cases of equivocation, and in that case evidence of the intention of the testator seems to be receivable." Turning to the other cases, the one most like the present was *Careless* v. *Careless* (2), where the bequest was to "Robert Careless, my nephew, the son of Joseph Careless." It appeared that the testator had no brother named Joseph, but two named John and Thomas, each of whom had a son named Robert. The Court admitted evidence to explain the ambiguity, and putting together what was decided in that case, in *Price* v. *Page* (3), and in *Still* v. *Hoste* (4), by the Courts of Equity, I think I should be warranted in resorting to general evidence in the case before me, if I were

(1) 5 M. & W. 363.
(2) 1 Mer. 384.
(3) 4 Ves. 680.
(4) 6 Madd. 192.

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so minded; but, in my opinion, it is not necessary. I have already stated the circumstances of the case, and that there has plainly been a mistake. The testator was not on good terms with his elder son, who resided some distance from him. A provision is made in the will that the executor shall pay annually to testator's wife the sum of 10*l.*, and allow her her ordinary maintenance, so long as she and the executor reside together in the same house. This provision points to an existing residence, although it might be made to fit in with the other son, if he gave up his business. It is more probable, however, that the testator projected that the widow would continue to live with her younger son. If he had intended that she should go and live with the elder son, or that the elder son should give up his business, he would have used different terms from what he has done. For these reasons I have come to the determination that the use of the words Forster Charter was obviously a mistake. The writer of the will has had at the time in his mind the name of the testator, and has made a bungling performance of his work. The probate must be revoked, and granted to Charles Charter, but the costs of both parties will be paid out of the estate. I may say that if I had had occasion to refer to the parol evidence generally, it would have confirmed the view I have now taken.

Subsequently, on the application of *Dr. Spinks, Q.C.*, and on the grounds that on the previous occasion he had only argued the question of law as to the admission of parol evidence, and by arrangement with the other side, had not entered into the merits of the case as the defendant desired before doing so to cross-examine the witnesses who had made affidavits in support of the plaintiff, the Court ordered the cause to be reheard. The rehearing took place on the 8th and 10th of November, 1871.

Manisty, Q.C. (*Dr. Spinks, Q.C.*, and *Bayford* with him), appeared for the defendant, William Forster Charter. The deceased executed his will in 1859, and he died in 1869. The will was read over to the family at the funeral, and it was taken for granted by all that the property was given to the defendant, and this view of the matter continued for twelve months, until the litigation commenced in June, 1870. Where an ambiguity arises on a will it may be explained by extrinsic circumstances; but it will not arise

if an unbiassed person on reading the will and knowing the state of the family could have no doubt as to the person intended.

[LORD PENZANCE. Your argument goes to this extent, that if a man has four or five Christian names, and one of them only is given in the will, that is a proper description.]

Manisty. No. There must be a sufficient description to identify him. In this case we say the will contains an adequate description of William Forster Charter. The deceased had two sons only, and as Charles was never called Forster, there can be no ambiguity.

[LORD PENZANCE. It may not be a false description where one of several names only is used, and that one by which the person was never known or called, but it is an inadequate one. A part of a name may produce as much uncertainty as if a wrong name were given. Surely in such a case evidence must be gone into to shew whether or not a blunder has been committed.]

Manisty. The material fact in this case is that the part of the name given is enough to identify the elder son, seeing that that part in no way belongs to the younger, not having been given to him in baptism or otherwise. Our proposition is that the will may be read as referring to the defendant, although his name imperfectly answers that in the will; seeing there is no other person to whom the description more precisely answers. There is no ambiguity in an imperfect description, that arises where it can be shewn that the description applies to two persons indifferently or equally; and it must arise on the will, nd not in the mind of some person. If the description be so imperfect that the Court cannot say to whom it belongs, it will not decide in favour of either of the parties; there will be no will. Assuming the Court holds that there is an ambiguity, and that all the facts given in evidence may be legitimately admitted, we further contend that they do not shew the testator intended to prefer the younger to the elder son. In his two previous wills, testator had not excluded the elder son, who although much absent was always on good terms with his father, whereas at the time the will was executed the plaintiff was estranged from his father, and had for a time left his home, to which he was allowed to return through the mediation of his brother. They referred to 1 Jarman on Wills (3rd ed.) 407–409; *Doe* d. *Hiscocks* v. *His-*

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cocks (1); *Doe* d. *Allen* v. *Allen* (2); *King's College Hospital* v. *Wheildon* (3); *Miller* v. *Travers* (4); Wigram's Extrinsic Evidence, prop. 7.

Dr. Tristram and *Pritchard*, who appeared for the plaintiff, were not required to argue the case.

Nov. 21. LORD PENZANCE. A misapprehension occurred in this case which led to its being reheard, after an opportunity had been given for cross-examining the witnesses who had made affidavits. In the result the case remains much the same as before. If the evidence is admissible it is difficult to come to any other conclusion than that the testator intended to make his younger son Charles his executor and legatee. The two attesting witnesses speak to unequivocal declarations by the testator to that effect at the time the will was made. The widow deposes that this was the testator's constantly expressed intention all along, and that he said he had done it over and over again after the will was made and up to the time of his death. John Thompson and William Walton, neighbouring farmers, and many others, speak to the testator's reiterated statements that he had left all to his son Charles, who resided with him. James Rutherford and Robert Ward, intimate acquaintances of the testator, speak to the same effect, and the latter, who was present when the will was read after the funeral, at once called out it was a mistake. Then there is the provision in the will that the executor should allow the widow her ordinary maintenance "*so long as they reside together.*" The fact being that the younger son, Charles, was then and up to the testator's death residing with his mother, whilst the elder brother was resident at a place a hundred miles off, and engaged in business there. And, lastly, there is the fact distinctly sworn to, and not contradicted, that the defendant was never called or known by the name of Forster, but only William or Willie. Against these facts the defendant has little to set in the way of evidence. The principal, if not the only statement of importance being, that about the time the will was made the younger son Charles had a quarrel with his father and left home for a time.

(1) 5 M. & W. 363.
(2) 12 Ad. & E. 451.
(3) 18 Beav. 33.
(4) 8 Bing. 244.

This is indeed deposed to by the defendant and one of his sisters; but it is positively contradicted by the plaintiff and his mother, who both swear that the disagreement was with his mother and not his father. The time of his leaving home is also in dispute. The defendant's version of this affair can hardly be true if the attesting witnesses have given a truthful account of the testator's declaration. If the evidence then is admissible of the testator's intentions, I come without difficulty to the conclusion that the plaintiff was the son intended; but was the evidence admissible? I am not sorry that the case has been re-argued, for it has brought out more prominently than ever the real basis of the defendant's contention, and has, I venture to think, narrowed that contention to a very distinct and definite point, which is this: that as Forster is one of two names by which the defendant was christened, there is no ambiguity in the will to be removed. The defendant in short says this, "Forster is at least one of my names, and it in no way belongs to my brother, so that the description, if not quite accurate, is at least more like my name than his. Therefore there is no ambiguity as to which of us was meant." But is this proposition correct? If a man be christened by several names they constitute in law but one Christian name, and any one of them, the rest being omitted, is not the full legal name of the individual. I am far from saying that a bequest to a man by his first Christian name, or by any one of them, by which he is familiarly known or even commonly called by the testator, would not be a valid bequest. Undoubtedly it would. But this is a case in which the name used is neither the legal Christian name, nor the first name, nor a name by which the man was ever called or known by anybody. The executor is described as "my son Forster Charter." The first part of this description lies in the words "my son." The facts proved shew that the testator had two sons, and two only. That narrows the indication then to two persons. The question is, does the name Forster Charter *properly or with reasonable certainty* describe either of them? If not, there is an ambiguity between the two sons, for the executor is to be a "son," and his name is not with reasonable certainty given. It is difficult, if not impossible, to imagine that the testator, whose intention we are seeking, purposely described the defendant (whom he had never called by any

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other name than William or Willie) as simply "Forster." There has, then, been a mistake. And this is, to my mind, a not unimportant matter, for it makes the case even stronger for the admission of evidence than others in which the Court has had to deal with a merely defective description, that is, a description in which the testator wrote what he meant to write, and all that he meant to write, but failed in accurately describing the object he had on his mind. The testator has not failed in his description from want of knowledge or memory. The error was, therefore, what Sir W. Grant, in the case of *Careless* v. *Careless* (1), called a slip of the pen. It may be that the writer of the will in this case carelessly omitted the first name, William, though the testator mentioned the full name to him. That would be one way of accounting for the mistake. Another way, and as probable an one, as it seems to me, would be to surmise that the writer had got the name of the testator "Forster Charter" in his head, and, having written it three lines higher up, had inadvertently repeated it in describing the executor. But is the Court at liberty to decide this case upon these speculations? And if there has been a mistake, whether of omission or otherwise, in consequence of which neither of the two sons is distinctly or accurately described, is not an ambiguity created; and is any other course open to the Court, if the rest of the will and the surrounding circumstances do not solve the difficulty, than to admit parol evidence of the testator's intention?

At this stage of the inquiry, it was that the plaintiff's counsel asserted the proposition to which I have before alluded, and which, if it were supported by authority, would, I think, carry him through, namely, that if the description was imperfect the Court was bound to apply it to that one of the sons whose name it most nearly resembled. Is this contention reasonable, and is it supported by authority? Once concede that there has been a mistake, and it seems to be unreasonable to exclude evidence which may be so cogent as to set all doubt at rest, and proceed to apply the blundering description to one son rather than the other, because the blunder has taken a form which more nearly corresponds with the true name of that one than with the name of the other. But whatever the reason of the matter may be the Court must, I think,

(1) 1 Mer. 384.

be bound by the authorities; and how do they stand? I do not propose to go through any number of them. They are collected in Mr. Jarman's book, vol. i. p. 405. I find no case in which the proposition contended for is laid down or applied. On the other hand, I find the general principle laid down in a contrary direction by a most careful and able judge, the Lord Chief Justice Tindal. In *Miller* v. *Travers* (1) he says, "The other class of cases is that in which the description of the person who is intended to take is true in part, but not true in every particular. As where an estate devised to a person whose Christian or surname is mistaken, or whose description is imperfect or inaccurate, in which latter class of cases parol evidence is admissible to shew who was intended to take, provided there is sufficient indication of intention on the face of the will to justify the application of the evidence." To this general statement of the rule, I will add one or two cases. In *Still* v. *Hoste* (2) the bequest was to Sophia Still, daughter of Peter Still. Peter had two daughters, Selina and Mary Ann. There was obviously a mistake. It was equally obvious that the name Selina more nearly resembled Sophia than Mary Ann did. Indeed it was hardly possible to conceive that if the testator knew anything of the real names of Peter Still's daughters, he could have blundered into calling Mary Ann, Sophia; while it was easy to conceive that he might have written Sophia for Selina. But the Court admitted parol evidence, including that of the attorney who made the will. In *Thomas* v. *Thomas* (3) the devise was "to my granddaughter Mary Thomas, of Llechlloyd, in Merthyr parish." There was no person who answered the description entirely. There was a great-granddaughter of the name of Mary Thomas, but she did not live at the place named. There was also a granddaughter who did live at the place named, but her name was Elinor Evans. Evidence was admitted to prove that Elinor Evans was the person intended. It failed to satisfy the jury, but the Court held that the evidence had been properly admitted. In this case it was strongly contended that the name of the devisee being correctly given, although the entire description was not accurate, the Court was precluded from all inquiry by evidence, as

(1) 8 Bing. 248. (2) 6 Madd. 192.

(3) 6 T. R. 671.

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to whether another person, whose name in no way resembled that given in the will, was the person intended; but the Court held otherwise. *Doe* d. *Morgan* v. *Morgan* (1) and *Doe* d. *Allen* v. *Allen* (2) are both cases in which there were two people each answering the description, but other provisions in the will pointed strongly to one of them in preference to the other, as the object probably intended. In neither case did the Court decide on this probability, but resorted to parol evidence.

There is, therefore, I conceive, good warrant for admitting the whole of the parol evidence, including the testator's declarations; but if these were excluded there would, I think, be sufficient to guide the Court to the conclusion that the name Forster Charles was a mistake, and that the younger son was intended. On the whole the Court pronounces in his favour, and orders the probate granted to the defendant to be revoked.

Attorneys for plaintiff: *Flux & Leadbitter.*
Attorneys for defendant: *Helder & Kirkbank.*

(1) 1 C. & M. 235. (2) 12 Ad. & E. 451.

WYTCHERLEY *v.* ANDREWS.

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May 30.

Compromise of Testamentary Suit—Persons not Parties to Suit, although cognizant of it, not bound by Compromise.

A next of kin, although not cited to see proceedings, and not having intervened, is bound by a decree in a suit in which a will is contested by other next of kin, if he was cognizant of the suit and had an opportunity of intervening. But this rule does not apply to a case where the parties to the suit compromise it, and the decree is founded on the compromise.

The Court having pronounced for a will in consequence of a compromise between the parties contesting it, a next of kin, who was no party to the suit, although cognizant of it, was held not to be barred by the decree from instituting a fresh suit for the revocation of probate.

On the 21st of June, 1869, the defendant Mrs. Andrews, then Mrs. Worth, obtained probate in common form of the will of Mary Ann Osborn, as the sole executrix therein named. She was afterwards cited to bring in the probate by Mrs. Meyrick, one of the next of kin; and having brought it in she filed a declaration propounding the will. Mrs. Meyrick pleaded undue execution, incapacity, and undue influence. Issue was joined on these pleas, and the cause came on for trial by a special jury on the 16th of March, 1870, when a compromise was effected, and Mrs. Meyrick's opposition was withdrawn on the payment of her costs by Mrs. Andrews, to the amount of 400*l.*, and the Court by consent pronounced for the will. On the 5th of May, 1870, the plaintiff, Mrs. Wytcherley, a sister of Mrs. Meyrick, cited the defendant to bring in the probate, and shew cause why it should not be revoked. The defendant filed an act on petition, alleging that the plaintiff had been privy to the previous suit of *Meyrick* v. *Worth;* that she had an opportunity of appearing in that suit, and contesting the will; that she, as well as Mrs. Meyrick, had given instructions to the solicitor in the suit, and that she had consented to the compromise; and praying that contentious proceedings might be stayed. The plaintiff, in her answer to the act on petition, admitted that she was cognizant of the previous suit, but denied that she was privy to the proceedings, and that she assented to the compromise. Affidavits were filed, the effect of which is stated in the judgment; and the question was argued on the 26th of April, 1871.

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Dr. Deane Q.C., and *Dr. Tristram*, were for the plaintiff.

Dr. Spinks, Q.C., and *Bayford*, were for the defendant.

The cases cited were *Newell* v. *Weeks* (1); *Colvin* v. *Fraser* (2); *Ratcliffe* v. *Barnes.* (3)

LORD PENZANCE. The question in this case is, whether the plaintiff is, or is not, precluded from further proceedings by the decree in the previous suit. The plaintiff is the sister of Mrs. Meyrick, who was a party to the previous suit of *Meyrick* v. *Worth*, in which she contested the will of the deceased. That suit was commenced by Mrs. Meyrick, and was carried on with the knowledge and cognizance of the plaintiff. It is proved by the affidavits that both sisters went to the attorney, but that Mrs. Meyrick took the leading and chief part, and that she alone was a party to the suit. The cause came on for trial, and the affidavit of Mrs. Meyrick states in substance that during the trial her attorney called her out of the court, and said something to her about compromising the suit, but that before she could answer or ask for an explanation, he returned into court, and when she herself followed him thither she found another case was going on, and was told that her suit had been compromised. The compromise was certainly of a suspicious character; it was that the attorney should be paid 400*l.* for his costs, and that the will should be allowed to be proved. The question now is, whether the present plaintiff ought to be bound by those proceedings. It was contended that it was not necessary in the Court of Probate that a person should be a party to the suit in order to be bound by its result; and after looking at the authorities cited, I am bound to say that the proposition is correct. The rule may, perhaps, in some cases operate unjustly; and the question whether it is applicable to any particular case is one of fact, depending on the evidence how far the person whom it is sought to bind by the former proceedings was privy to them. But, on the other hand, it is easy to avoid all doubt, by citing all persons intended to be bound to see proceedings in the first suit. On the other hand, there is a practice in this court, by which any person having an interest may make himself a party to the suit by intervening; and it was

(1) 2 Phillim. 224. (2) 1 Hagg. Eccl. 107.
(3) 2 Sw. & Tr. 486; 31 L. J. (P. M. & A.) 61.

because of the existence of that practice that the judges of the Prerogative Court held, that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case. That principle is founded on justice and common sense, and is acted upon in courts of equity, where, if the persons interested are too numerous to be all made parties to the suit, one or two of the class are allowed to represent them; and if it appears to the Court that everything has been done bonâ fide in the interests of the parties seeking to disturb the arrangement, it will not allow the matter to be re-opened. That has been undoubtedly the rule also in the Prerogative Court, but I do not find that it has ever been applied to cases of compromise. It is one thing to say that a person who stands by and lets another fight his battle, must be bound by the result of the contest; and it is quite another thing to say that, without any notice that there was going to be a compromise, and without any knowledge that the suit was not proceeding to its natural end, he must nevertheless be bound by any agreement which the parties to the suit may choose to enter into. That would be carrying the rule very far indeed. I find no authority for carrying it to that length, and I am not disposed to extend it beyond the limit within which it has been confined in former cases. In the prior suit, if the story of Mrs. Meyrick be true, the compromise was not a fair one, even as far as she was concerned; but setting that aside, and assuming that she is bound by it, I see no reason why the present plaintiff should be bound by it. A bargain only binds those by whom it is made. Persons who are willing to stand by while a contest is going on are bound by the decision of the Court, but they are not compelled to abide by a compromise, when no decision is in fact come to by the Court. I pronounce against the act on petition with costs.

Attorneys for plaintiff: *Fearon, Clabon, & Fearon.*
Proctors for defendant: *Jenner & Dyke.*

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Jan. 23.

IN THE GOODS OF THOMAS RUDDY.

Executor out of Jurisdiction—38 *Geo.* 3, *c.* 87, *ss.* 1, 2, 3; 21 & 22 *Vict. c.* 95, *s.* 18 —"*At the expiration of Twelve Months from the Death of Testator.*"

The words "at the expiration of twelve months from the death of the testator," in the first section of 38 Geo. 3, c. 87, when compared with the words given in the form of affidavit in the second section, and of the grant of administration in the third, must be held to mean at or after the expiration of that period. When the applicant is residuary legatee, whose interest is undetermined, the grant will be made under 38 Geo. 3, c. 87, but where a particular sum is set aside for and actually payable to the applicant, the grant can be made under 21 & 22 Vict. c. 95, s. 18.

THOMAS RUDDY, late of Chobham, Surrey, died on the 13th of October, 1850, having made a will, bearing date the 8th of July, 1844, in which he nominated as executors Thomas Hudson the younger, Richard Rowland, and Mary Ruddy. On the 19th of November, 1850, probate of the will was granted to Thomas Hudson and Mary Ruddy; Richard Rowland having renounced his right thereto. Mary Ruddy died on the 16th of December, 1859, having made a will, in which she appointed as executors William Rowland and Thomas Midhurst, who duly proved the same. Thomas Hudson having misappropriated some of the property of the deceased and of other persons, left this country in February, 1855, and has since continued to, and does still, reside out of the jurisdiction of Her Majesty's Courts of Law and Equity. On the 13th of March, 1855, he was adjudicated a bankrupt, to which adjudication he has not surrendered. The only property of the deceased left unadministered by the executors is an interest in the residuary estate of James Ruddy, which became divisible in January, 1871, by the death of the life tenant, Fanny Ruddy.

Searle moved the Court, under 38 Geo. 3, c. 87, and 21 & 22 Vict. c. 95, s. 18, to grant administration of the goods of the deceased to Mary Rapley, wife of George Rapley, one of the residuary legatees named in his will.

[LORD PENZANCE. The 38 Geo. 3, c. 87, s. 1, says that at the expiration of twelve calendar months from the death of a testator, if the executor to whom probate of the will has been granted is

then residing out of the jurisdiction of His Majesty's Courts of Law and Equity, it shall be lawful to make a grant of administration to the persons interested. In this case the executor remained in this country four years after taking probate and after the death of the deceased.]

The statute means, that although the Court shall not within twelve months grant such administration, for the executor has that period of time to get in and distribute his testator's effects, it may do so at any time afterwards, if the executor is out of the jurisdiction. There has been no laches in this case, as the residue of the estate of James Ruddy is only now divisible. He referred to *In the Goods of Cooper* (1); *In the Goods of Collier* (2); *In the Goods of Baynes* (3); *In the Goods of Hampson.* (4)

[LORD PENZANCE. The statute is a remedial one, to enable persons to enforce their legal claims, and ought to be construed liberally. I will take time to consider its effect.]

Jan. 23. LORD PENZANCE. Since the last motion day the Court has considered the construction which ought to be put on this statute, and it has come to the conclusion that the construction it was inclined to put upon it is not correct. The actual words of the statute are that "at the expiration of twelve calendar months from the death of any testator, if the executors or excutor, to whom probate of the will shall have been granted, are or is then residing out of the jurisdiction of His Majesty's Courts of Law and Equity, it shall be lawful for the Court, which has granted probate of such will, upon the application of any creditor next of kin or legatee, grounded on affidavit hereinafter mentioned, to grant such special administration as is hereinafter also mentioned." My difficulty arose on reading the words "then residing," but it was pointed out to me that if I restricted the operation of the statute to the case of the executor residing out of the jurisdiction at the expiration of twelve months, the intention of the statute could hardly be worked out. On further looking into the matter, I find that the affidavit is to be made in a form given in the second section, which contains these words "and that C. D., the only executor capable of acting,

(1) 1 Sw. & Tr. 66.
(2) 2 Sw. & Tr. 444; 31 L. J. (P. M. & A.) 63.
(3) 7 Jur. (N.S.) 832.
(4) Law Rep. 1 P. & M. 1.

11 Jur. N.S. 911

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IN THE GOODS OF RUDDY.

and to whom probate has been granted, hath departed this kingdom, and is now (that is, at the time of making the affidavit) out of the jurisdiction of His Majesty's Courts of Law and Equity." So that, putting the words of the first section of the statute side by side with the words of the affidavit, it would seem that all that is required is that the executor should be out of the jurisdiction at the time the application is made. Again, in the third section, the form of the administration to be granted is given, and it contains the same words. "Whereas A. B. did, whilst living, make and duly execute his last will and testament, in writing, and did therefore nominate, constitute, and appoint C. and D. his executors, who proved the same, and now reside out of this kingdom, and out of the jurisdiction of His Majesty's Courts of Law and Equity." Both the affidavit, therefore, and the grant point to a residence out of the jurisdiction at the time of the application, and I must therefore read the words in the first section as "at or after," and I can consent to the application. A difficulty, however, arises in this case that the applicant is one of the residuary legatees, and it is uncertain whether there is any residue, so that the Court is not in a position to make a grant limited to any particular sum of money, but the intention of the statute was a reasonable one, to enable an individual to receive the particular sum, whatever it might be, due to him from the deceased's estate. I think, therefore, in the case of a residuary legatee the grant should be made under 38 Geo. 3, c. 87, to enable the applicant to become a party to a suit in Chancery, and to receive such an amount as the Court of Chancery may find to belong to such legatee.

Attorney: *P. W. Lovett.*

JONES *v.* JONES. (1)

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Jan. 19.

Suit for Judicial Separation—Wife's Costs—20 & 21 *Vict. c.* 85, *ss.* 22, 51—*Rules* 158, 159 (1865)—*Appeal—Alimony pending Appeal.*

By 20 & 21 Vict. c. 85, s. 22, it is enacted that in suits for judicial separation, the Court for Divorce shall proceed, and act, and give relief on principles and rules as nearly as may be conformable to those on which the ecclesiastical courts gave relief, but subject to the provisions contained in the Act, and to the rules and orders under the Act; and by s. 51 the Court, at the hearing of any suit or petition under the Act, has authority to make such order as to costs as to it may seem just. By rule 159 (1865), the Court reserves to itself the power to refuse the wife her costs if the decision of the Court is against her:—

Held, that although by the ordinary practice of the ecclesiastical courts the wife, unless she had a separate income, was entitled in every case to her costs of suit, the rule 159, which varies from that practice, has been properly made, and gives a reasonable and lawful discretion to the Court in the matter of costs.

Alimony is payable to the wife on an appeal, unless it shall appear to the Court that such appeal is frivolous and vexatious, or she has been guilty of laches.

THIS was a petition for judicial separation presented by Mrs. Alice Jones against her husband, Robert Jones, by reason of his incestuous adultery and cruelty.

The respondent filed an answer denying both charges, and pleading condonation.

On the 27th of May, 1871, the Judge Ordinary, by consent, made an order that the respondent should pay alimony to the petitioner at the rate of 10*s.* per week pending suit. On the 5th of June, 1871, the wife's costs up to that time were taxed against the respondent at 40*l.* 2*s.* 7*d.*, which were subsequently paid; and on the 13th of June, the Judge Ordinary directed the respondent within one week to pay into the probate registry the sum of 60*l.* to cover the costs and expenses of the petitioner of, and incidental to, the hearing of the cause, or to give sufficient security for the same. On the 21st of August, 1871, the respondent deposited in the registry a bond, executed by himself and one surety in the penal sum of 120*l.*, for the payment of the said sum of 60*l.*

The cause was heard before the Judge Ordinary on the 24th of November, when he dismissed the petition, and refused to condemn the respondent in any costs incurred by the petitioner. On the

(1) Before the Judge Ordinary, Mellor, and Brett, JJ.

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2nd of December an appeal was entered against this decision, and on the 8th of December, by order of the Court, it was referred to one of the registrars to report what sum should be paid into the registry to cover the costs and expenses of the petitioner of and incidental to her appeal, or what is sufficient security to be given by the respondent; and on the 16th the registrar reported that 30*l.* would be a proper amount to be paid into the registry. On the 16th of January, 1872, an application was made to the Judge Ordinary to allot alimony to the petitioner during the appeal, which motion was adjourned for the consideration of the full Court.

Searle, for Mrs. Jones, before entering on the merits of the appeal, applied for an order upon the respondent to pay to his wife alimony during the appeal at the same rate as she was paid during the time the suit was pending before the Judge Ordinary. According to the practice of the ecclesiastical courts, although an application for alimony was necessary to the court of appeal it was granted as of course to the same amount as received in the court below, unless the husband's income had, in the meantime, decreased. There is nothing on the subject in the rules and orders, but the Judge Ordinary was of opinion that the application should be made to the full Court.

[THE JUDGE ORDINARY. It may be just that the wife should have alimony during the appeal; but, on the other hand, if she has a right to it in every case, she may be induced to enter an appeal in order that alimony should be continued to her, and so great evil would follow.]

That cannot be here. No charge has been made against the petitioner, so that she is entitled to maintenance from her husband. As during the appeal she cannot return to cohabitation, if she has no alimony allotted to her, she must proceed against him for necessaries with the aid of a third party. According to Coote's Ecclesiastical Practice, p. 365, the wife was entitled to alimony pending an appeal in every case.

[BRETT, J. However frivolous the appeal?]

Yes. The only exceptions were delay or laches on the part of the wife: *Loveden* v. *Loveden.* (1)

(1) 1 Phillim. 208.

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[THE JUDGE ORDINARY. It is not necessary to entertain such a large proposition as that, because the petitioner is not in this case charged with adultery. We propose to hear the argument on the appeal before we decide the question as to alimony.]

Searle then contended that the Judge Ordinary's decision, by which he dismissed the petition was against the weight of the evidence; and, secondly, that in a suit for judicial separation, he cannot deprive the wife of her costs of suit as against her husband. As regards the question of costs, a bond had been deposited in the registry by the husband to meet the wife's costs, but on the ground that he believed the case not to have been brought bonâ fide, the Judge Ordinary refused to allow the petitioner to receive any costs. In a suit for judicial separation, the Court is bound to proceed and give relief on the principles and rules acted upon in the Ecclesiastical Court, except so far as they are varied by the provisions of the Act, and the rules and order made under the Act. It was the invariable practice of the ecclesiastical courts for the wife to obtain her full costs, whether successful or not. She might have had them taxed de die in diem, and they were in the proctor's possession before the hearing: *Wilson* v. *Wilson* (1); *Fyler* v. *Fyler*. (2) The same practice has been recognized that the wife, whether successful or not, should have her costs, so far as the sum paid into court sufficed, from the formation of this court until the rules and orders (1865) were published: *Wells* v. *Wells* (3); *Hepworth* v. *Hepworth* (4); *Evans* v. *Evans and Robinson* (5); *Holt* v. *Holt and Fleeming* (6); *Ditchfield* v. *Ditchfield*.(7) The rules applicable to the wife's costs are 158, 159. The former allows the wife's costs to be taxed against the husband after directions have been given as to the mode of trial of a cause, and directs that the registrar shall ascertain and report what is a sum sufficient to be paid into the registry, or what is a sufficient security to be given by the husband to cover the costs of and incidental to the hearing or trial of the same. Rule 159 directs that on the hearing or trial of a cause, when the decision is against the wife,

(1) 2 Hagg. Cons. 203.
(2) Deane, 175.
(3) 1 Sw. & Tr. 303.
(4) 2 Sw. & Tr. 414.
(5) 1 Sw. & Tr. 328.
(6) 28 L. J. (P. M. & A.) 12.
(7) Law Rep. 1 P. & M. 729.

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no costs of and incidental to such hearing or trial shall be allowed as against the husband, except such as shall be applied for and ordered to be allowed by the Judge Ordinary at the time of such hearing or trial. This last rule cannot apply to cases of judicial separation, because as regards them the Court is bound by the rules of the ecclesiastical courts, under which the wife was entitled to her costs in all events; and there was no difference whether the wife brought the suit, or it was brought against her.

[BRETT, J. It may be that under the old practice the Court had no discretion, but under the 53rd section (20 & 21 Vict. c. 85), the Court has power to make rules concerning the practice and procedure of the Court, and under the rules so made it has a discretion as to costs.

THE JUDGE ORDINARY. The 22nd section also which directs that in certain cases the Court shall act on the principles and rules of the ecclesiastical courts, adds, subject to the provisions contained in the Act, and to the rules and orders under the Act. The object of the rule is to allow the Court in suits wholly vexatious, to refuse the wife her costs. It leaves the matter in the discretion of the Court, to be exercised at the hearing, when all the facts are fresh in the minds of the Court, and only in extreme cases will it refuse such costs.]

The rule works hardly against the attorney or proctor. He is obliged to take his instructions from the wife, and until the hearing he cannot tell how far her statement can be denied.

[MELLOR, J. If the proctor goes to a hearing when he ought not, he will lose his costs; but he is entitled, under the rules, to receive them up to the hearing. The question is, is the rule ultrà vires. If not, the construction is plain, and we must decide this question in accordance with it.

Dr. Spinks, Q.C., and *Finney*, appeared for the respondent, but were not called upon to argue the case.

MELLOR, J. Three points were raised in this case. First, that the wife is entitled to alimony pending an appeal; secondly, that the decision of the Judge Ordinary on the petition of the wife was against the weight of the evidence; and, thirdly, that the Court had no right to refuse the wife her costs. On the two last

points I am of opinion there is no foundation for the contention of the appellant. As regards alimony, under such circumstances as the present, so long as the wife continues a wife, there is no real reason why she should not have alimony, and it is due to her until on the petition there is a final decision against her. As regards the second point, I am clearly of opinion there is no foundation for the application. I never heard a case where it was suggested that the decision was against the weight of evidence which had so little foundation. The conclusion to which the Judge Ordinary came was the only one possible. As to the third point, whatever may have been the practice of the Ecclesiastical Courts, unless it can be shewn that rule 159 is not founded in law as ultrà vires, which Mr. Searle has not done, the power of the Judge Ordinary under it to make the order he did is as plain as words can describe it. As regards the policy of the rule also, I have no doubt, if exercised only in extreme cases, it is not impolitic to restrain the wife's power to annoy her husband. I think the power is a desirable one, and the construction of the rule is clear. There is no foundation for the appeal.

BRETT, J. I am of the same opinion. The husband being bound to supply his wife with necessaries, it is, in fact, for his relief that an order for alimony should be made. As to the question of costs, I very much doubt whether in the Ecclesiastical Courts after all the rule went further than that the costs were in the discretion of the Court; for in the case of *Wells* v. *Wells* (1) referred to I find the learned judge saying on this point, "It is difficult to draw a line in such cases, and a proctor refusing to bring before the Court any defence set up by his client, and not plainly unfounded, would incur a very grave responsibility; and therefore I think the costs (of the wife) must be allowed." There must have been a discretion there, otherwise there could have been no line. Again, in the case cited, *Ditchfield* v. *Ditchfield* (2), the Court did exercise a discretion against the wife, and would not allow her the costs of two suits against her husband, although in one she was successful. I am not clear, therefore, that there was not always a discretion in the Court on this subject of wife's costs;

(1) 1 Sw. & Tr. at p. 312. (2) Law Rep. 1 P. & M. 729.

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but the question now is, whether or not under the rule 159 the Court for Divorce can refuse a wife her costs of suit. This rule is made under the authority of s. 53 of the Divorce Act. The Court shall make such rules and regulations concerning the practice and procedure under this Act as it may, from time to time, consider expedient. Is a rule as to costs one of practice? if so, there is a power to make it under s. 53; and in a case like the present of judicial separation the power to make such rules is distinctly recognized at the end of s. 22. Taking these two sections together, there can be no doubt that rule 159 was properly made. The construction is clear; according to the ordinary meaning of language nothing can be plainer. Looking to the facts before the Court, it was an extreme case. The suit was frivolous and vexatious; the wife could hardly have believed her own case, but must have instituted the suit for the purpose of annoyance and vexation. The discretion to be exercised is a judicial discretion; and even according to the practice of the ecclesiastical courts, I think it could have been exercised against the wife in extreme cases. I have already said that this is such an one.

THE JUDGE ORDINARY. There is no doubt that this Court in suits for judicial separation is to proceed and act on principles and rules which in its opinion shall be as nearly as possible conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief; but the statute adds "subject to the provisions in the Act contained, and the rules and orders made under the Act." The legislature intended no more than that the old practice should be carried on subject to such rules as might be desirable. But s. 51 places the whole matter of costs in the discretion of the Court, for it says that on the hearing of any suit, proceeding, or petition under the Act, the Court may make such order as to costs as to it may seem just; and s. 53 authorizes it to make rules and regulations concerning the practice and procedure of the Court. The former section, therefore, gives the Court full discretion as to costs; and as the regulation of costs is part of the practice of the Court, the latter section enables the Court to make rules concerning them. No practical objection has been made as to the meaning of the rule. Is it, however, politic or right? for, un-

questionably, under certain circumstances it might operate harshly. The first obvious effect is, that it might prevent an attorney recovering his costs, when he represents a wife, in all cases in which she does not succeed. It would be a great impediment to the wife's defence if, in all cases of failure, she were deprived of her costs. On the other hand, if the wife's attorney in all cases had a vested right to his costs, such a rule would be an engine of oppression and great wrong to the husband. On the whole, I think the matter may be fairly left in the discretion of the Court to handle it according to the circumstances of each case, and therefore that the rule is politic.

Appeal dismissed, the wife to have her costs on the question of alimony, but not of the appeal itself.

Proctor for appellant: *E. W. Crosse.*
Proctor for respondent: *C. P. Lochner.*

TWISLETON *v.* TWISLETON AND KELLY. *Jan.* 23.

Husband's Petition for Dissolution—Withdrawal—Alimony.

The husband petitioned the Court for a dissolution of his marriage, by reason of his wife's adultery. In her answer the wife denied such adultery and made counter charges against the petitioner, of adultery and cruelty, which he denied, and directions were given as to the mode of trial of the facts in issue. The petitioner then moved for leave to withdraw the petition on payment of the wife's costs. A few days before the motion was made, the respondent filed a petition for alimony:—

Held, that, if a wife use due diligence in claiming alimony, the husband will not be allowed to withdraw his petition until he has paid the alimony allotted to her up to the time of the withdrawal; but that if the wife delay to present her petition up to the last moment, so that the husband has not had time to answer it, the Court will not refuse to allow him to withdraw, until he has filed an answer to such petition, and paid what the Court may allot upon it.

JAMES TWISLETON petitioned the Court to dissolve his marriage with Ann Amy Twisleton, by reason of her adultery with Thomas Kelly. The petition was filed on the 3rd of March, 1871. On the 28th of April, 1871, the respondent filed her answer, in which she denied the adultery alleged against her, and made

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counter charges of adultery and cruelty against the petitioner. In Trinity Term, 1871, directions were given as to the trial of the facts in issue. On the 6th of December, 1871, the respondent filed a petition for alimony; and on the 14th of December a notice was served upon her attorney of an intended application to the Court for leave to withdraw the petition. On the 16th of December she filed an affidavit that she has no means, and that during the pendency of the suit, her board, lodging, wearing apparel, and other necessaries had been provided for her at the expense of other parties.

Dec. 19. *G. Browne* moved for leave to withdraw the petition on the payment of the costs of the respondent and co-respondent.

Dr. Swabey, on behalf of the respondent, objected. The Court will not allow the petition to be withdrawn; but will order the husband to answer the petition for alimony.

1872. Jan. 23. THE JUDGE ORDINARY. The Court has come to the conclusion that the husband is entitled to have his petition dismissed on payment of costs. The circumstance of the wife having filed a petition for alimony, is not alone sufficient to stay the hands of the Court. If, indeed, she had done that promptly, the effect might have been different; but the original petition was filed in March, 1871, and the petition for alimony not until December. The petition must be dismissed on the husband paying all the wife's costs, including the motion as to the dismissal.

Attorneys for petitioner: *Johnson & Weatherall.*
Attorney for respondent: *W. Shaw.*
Attorney for co-respondent: *J. Tremellen.*

WILSON *v.* WILSON AND HOWELL. (FIRST CASE.) 1871 Nov. 9.

Matrimonial Suit—Rules and Orders made by the Judge Ordinary alone—Rule 22—Absolute Appearance—Plea to Jurisdiction—Practice.

Post 353, 4

The Judge Ordinary alone has power to make and alter or revoke rules and orders concerning the practice and procedure of the Court.

Charles v. *Charles* (Law Rep. 1 P. & M. 260) considered and affirmed.

A party who appears absolutely and not under protest, cannot plead to the jurisdiction, and delay filing an answer on the merits, until the question of jurisdiction raised by the plea be determined: but in his answer on the merits he may also plead the matters on which he relies as shewing that there is no jurisdiction.

GEORGE JAMES WILSON petitioned the Court for the dissolution of his marriage with his wife, Mary Stuart Craigie Halkett Wilson, by reason of her adultery with Archibald Howell. In the petition Mr. Wilson described himself of Anerley Road, in the county of Surrey, gentleman. The marriage took place at Cramond House, in the county of Midlothian, in Scotland. The parties cohabited at Almond Bank, Cramond, at Rowardennan, Lochlomond, Dumbartonshire, and at Drylan House, in the county of Midlothian, all in Scotland, and the adultery was alleged to have been committed at the two latter places. On Mrs. Wilson's behalf an absolute appearance was entered, but on the part of the co-respondent an appearance under protest. On the 4th of May, 1871, the respondent filed an answer to the following effect:—1. That the said George James Wilson has, and always had, his domicil in the kingdom of Scotland; and that he has not, and never had, a domicil, and that he is not, and never has been, bonâ fide resident in England. 2. And that the respondent has, and always had, her domicil in the said kingdom of Scotland; and that she has not, and never had, a domicil in England. 3. And that the marriage alleged in the said petition was contracted in the said kingdom of Scotland. 4. And that the adultery is alleged to have been committed in the kingdom of Scotland, and not in England. 5. And the respondent says, that by reason of the premises this Honourable Court has no jurisdiction to entertain the said petition, or to grant the prayer thereof; and that this Honourable Court ought not to take cognizance thereof. It concluded with a prayer that the Court would dismiss the petition.

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Searle moved the Court to order the answer to be taken off the file. As the respondent has appeared absolutely, it is too late to dispute the jurisdiction: Rule 22; *Forster* v. *Forster and Berridge* (1); *Garstin* v. *Garstin.* (2)

Dr. Spinks, Q.C., and *Inderwick*, for the respondent. The question is, what jurisdiction can this Court rightfully exercise over foreign marriages? The petition, on the face of it, shews no jurisdiction. It alleges a mere residence of the petitioner in this country; the marriage, cohabitation, and adultery were in Scotland. The civil status of the respondent being at stake, the Court ought, notwithstanding rule 22, to allow the question to be raised. There are two principles on this head:—first, that the tribunals of a country have no jurisdiction as to divorce, wherever the offence may have been committed, if neither of the parties has an actual bonâ fide domicil within its territory: Bishop on Marriage, bk. 7, ch. 34, s. 721; secondly, that in questions of marriage Ireland and Scotland are foreign countries: *Yelverton* v. *Yelverton* (3); *Warrender* v. *Warrender.* (4) And the House of Lords has decided that a Court of law should not exercise a jurisdiction as to marriage if the parties are not bonâ fide domiciled within its jurisdiction: *Pitt* v. *Pitt* (5); *Shaw* v. *Gould.* (6) It is a great injustice to foreigners to press rule 22 against them. A citation is served upon them, which requires them to appear absolutely within a certain number of days, and no notice is given to them to appear under protest if they desire to question the jurisdiction. It is a technical rule founded on the ecclesiastical practice, which is not appropriate to the proceedings in this court, and has no place in a criminal or any other court. The proper way to raise a question of jurisdiction should be by plea, from whence an appeal will lie: *Forster* v. *Forster and Berridge* (1); *Callwell* v. *Callwell and Kennedy* (7); *Forster* v. *Forster and Berridge* (*Q.B.*). (8)

Searle, in reply, referred to *Chichester* v. *Donegal* (9); *Ratcliff* v.

(1) 3 Sw. & Tr. 144; 31 L. J. (P. M. & A.) 185.
(2) 4 Sw. & Tr. 73; 34 L. J. (P. M. & A.) 45.
(3) 1 Sw. & Tr. 574; 27 L. J. (P. M. & A.) 34.
(4) 2 Cl. & F. 488.
(5) 4 Macq. 627.
(6) Law Rep. 3 H. L. 55.
(7) 3 Sw. & Tr. 259.
(8) 4 B. & S. 187; 32 L. J. (Q.B.) 312.
(9) Madd. & Gel. 375.

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Ratcliff and Anderson (1); *Deck* v. *Deck* (2); *Bond* v. *Bond* (3); *Brodie* v. *Brodie* (4); *Zycklinski* v. *Zycklinski*. (5)

Cur. adv. vult.

May 30. THE JUDGE ORDINARY. I took time to consider what should be done under the circumstances of this case. The petitioner filed a petition for divorce. The respondent appeared to the citation without protest. She then filed an answer, in which she alleged that George James Wilson has, and always had, his domicil in Scotland, and is not, and never has been, domiciled or bonâ fide resident in England, and that she has always had a domicil in Scotland, and never in England; that the marriage took place in Scotland, and the adultery also is alleged to have taken place in that country; and, therefore, that this Court has no jurisdiction to entertain the petition, or grant the prayer thereof. The present application is, that I will order the answer to be taken off the file, seeing that the respondent has lost the opportunity by not appearing under protest, and it is now too late to question the jurisdiction. Authorities were cited to shew that this principle had been acted upon in other cases. No doubt in all courts a time is fixed at which a party whom it is sought to bring within the jurisdiction of the Court must, if he means to object (in the sense of refusing to answer) to the jurisdiction, put in his plea, or appear under protest. This is common to all courts. In some it is in the shape of a plea in abatement. In the Probate Court it is by an appearance under protest. The true reason for the difference is this: In the common law courts the first step is by writ; but the mere service of a writ does not inform the defendant of such circumstances as may form a basis for an objection to the jurisdiction; whilst the facts stated in the citation in the Probate Court, and in the petition and citation in the Divorce Court, do put the respondent in a position at once to exercise such right, and object to the jurisdiction. In all cases such an objection should be taken at the earliest possible moment. An objection to

(1) 1 Sw. & Tr. 467; 29 L. J. (P. M. & A.) 171.
(2) 2 Sw. & Tr. 90; 29 L. J. (P. M. & A.) 129.
(3) 2 Sw. & Tr. 93; 29 L. J. (P. M. & A.) 143.
(4) 2 Sw. & Tr. 259; 30 L. J. (P. M. & A.) 185.
(5) 2 Sw. & Tr. 420; 31 L. J. (P. M. & A.) 37.

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the jurisdiction is practically a refusal to answer; but it does not follow that if a party does answer, and subsequently it turns out that the Court has no jurisdiction in the matter, that it will go on to make a decree, notwithstanding its want of jurisdiction. There is a distinct authority for this assertion. Sir H. Jenner, in *Taylor* v. *Morley* (1), says: "An objection to the jurisdiction of the Court may certainly be taken at any time; but it is more usual, and undoubtedly more convenient, that such objection should be taken in the commencement of the proceedings." This seems to be a very proper expression. It is more convenient, if a party wishes to raise the question of jurisdiction, so that he shall not be bound to answer, that he should do so at the beginning of the proceedings. Yet if he answers on the merits, and the circumstances of the case shew that the Court has no jurisdiction, it will hold its hands. Indeed, as regards the ecclesiastical courts, the common law courts would have issued a prohibition against them if they had attempted to exceed their jurisdiction. There is, therefore, a wide distinction between the two cases:—1, where a party objects to the jurisdiction for the purpose of refusing to answer; and, 2, where, notwithstanding the party has waived his right to object, the facts proved at the hearing give rise to the question, whether the Court has jurisdiction to entertain the suit. As regards the cases cited, in *Zycklinski* v. *Zycklinski* (2), and in *Forster* v. *Forster and Berridge* (3), there were formal pleas to the jurisdiction after the parties had appeared absolutely, and the Court ordered them to be taken off the file. On the other hand, in *Deck* v. *Deck* (4), *Bond* v. *Bond* (5), *Brodie* v. *Brodie* (6), and others, it is plain that the Court considered the question of jurisdiction on the facts as they arose. I have no hesitation in saying that the answer in its present form cannot be allowed to remain on the file of the Court; but if the respondent will answer on the merits, the allegation that the Court has no jurisdiction may remain as part of that answer. The Court would be stultifying

(1) 1 Curt. at p. 481.

(2) 2 Sw. & Tr. 420; 31 L. J. (P. M. & A.) 37.

(3) 3 Sw. & Tr. 144; 37 L. J. (P. M. & A.) 185.

(4) 2 Sw. & Tr. 90; 29 L. J. (P. M. & A.) 129.

(5) 2 Sw. & Tr. 93; 29 L. J. (P. M. & A.) 143.

(6) 2 Sw. & Tr. 259; 30 L. J. (P. M. & A.) 185.

itself to hold that although the facts, if proved, would deprive it of jurisdiction, it will not allow them to be pleaded. The respondent has lost the opportunity to question the jurisdiction, so that she may decline to answer; but if she answers on the merits, she may include such facts as go to shew that this Court has no jurisdiction in her case. The respondent must file her answer as to merits within a fortnight. If she does not do so, her present answer will be taken off the file.

From this order the respondent appealed to the full Court (the Judge Ordinary, Bramwell and Pigott, BB.).

Dr. Spinks, Q.C., and *Inderwick*, for the appellant. The first question is whether the rules and orders of 1865 are valid, having been made by the Judge Ordinary alone, and not by the Judge Ordinary and the other judges of the Court. All the rules and orders previous to 1868 were made by the Judge Ordinary, in conjunction with the other judges. The original Divorce Act (20 & 21 Vict. c. 85) does not empower the Judge Ordinary alone to make rules and orders, because "the Court," to which the power of making rules and orders is given by the 53rd section, must be taken to mean "the Court" as defined in the 8th section, namely, the Lord Chancellor, the three chief and three senior puisne judges of the common law courts, to whom were added the rest of the common law judges by 22 & 23 Vict. c. 61, s. 1. The 23 & 24 Vict. c. 144, merely confers upon the Judge Ordinary the power previously exercised by the full Court to hear and determine suits for dissolution and nullity, but it does not empower him to make rules and orders, and after the Act passed some new rules were issued by the Judge Ordinary and the other judges.

[THE JUDGE ORDINARY. The date of these new rules is November, 1860, and they were probably made and signed before the 28th July, 1860, when the 23 & 24 Vict. c. 144 was passed.]

The 30th section of the Probate Act (20 & 21 Vict. c. 77) directs that the rules and orders under that Act shall be made by the Judge of the Probate Court, with the concurrence of the Lord Chancellor and the Lord Chief Justice, or one of the judges of the superior courts, although the Judge Ordinary is the sole Judge of the Court of Probate. But even if the rules be valid, the 22nd rule ought

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to be rescinded as unreasonable, because it precludes a respondent from objecting to the jurisdiction, and in the case of a foreigner, or a person served with the citation abroad, and ignorant of the rule, it might work injustice.

[THE JUDGE ORDINARY. The rule is founded upon the practice of the Court, as settled by the late Judge Ordinary in *Forster* v. *Forster & Berridge* (1), *Zycklinski* v. *Zycklinski* (2), and several other cases.]

That decision ought to be reconsidered. If the Court has no jurisdiction on the facts, its jurisdiction cannot be founded by the entering of an absolute appearance. The practice of the Ecclesiastical Court, in suits for judicial separation, is not properly applicable to suits for dissolution, in which the decree affects the status of the parties.

The following cases were referred to:—*Charles* v. *Charles* (3); *West* v. *Turner* (4); *Dundalk Railway Co.* v. *Tapster* (5); 1 Chitty on Pleading, 897 (11th ed.)

Searle, for the petitioner, was not called on to support the order.

BRAMWELL, B. I am of opinion that the original statute (20 & 21 Vict. c. 85) gave the Judge Ordinary alone power to make rules and orders. The 53rd section enacts that "the Court," without giving any precise definition of the Court, shall have power to make rules and orders, and from time to time to revoke and alter them. But the 9th section enacts that the Judge Ordinary shall have full authority, either alone or with one or more judges of the said court, to hear and determine all matters arising therein, except petitions for the dissolving of or annulling marriage, &c., &c., "and, *except as aforesaid*, may exercise all the powers and authority of the said Court." The language of this and of other sections of the Act, such as the 11th, which provides for the temporary absence of the Judge Ordinary, and the 34th, which enables the Court to fix and regulate the fees, and to make rules for enabling persons to sue in formâ pauperis, appears to me strongly to support the view,

(1) 3 Sw. & Tr. 144; 31 L. J. (P. M. & A.) 185.
(2) 2 Sw. & Tr. 420; 31 L. J (P. M. & A.) 37.
(3) Law Rep. 1 P. & M. 260.
(4) 6 Ad. & E. 614.
(5) 1 Q. B. 667.

that even under the original statute the Judge Ordinary had power to exercise all the powers of the Court, with the exceptions pointed out in s. 9, and therefore that he had power to make rules. It is argued that it is not likely that the legislature would give the Judge Ordinary alone power to make rules in this Court, where other judges are associated with him, and would withhold that power from him in the Probate Court, of which he is the sole judge. The reason for the distinction may perhaps have been that the legislature did not think fit to entrust to him the power of making rules without the sanction of other judges in the Court of Probate, where he is uncontrolled, whereas in this court, where he is assisted by other judges, that power may well be entrusted to him. But whether this be the reason or not, one cannot shut one's eyes to the fact that inconsistent statutes are sometimes passed, and when the words of a statute are clear, it would be improper to depart from their plain meaning, because there is an apparent incongruity between that and some other statute.

But whether or not the power is given by the original statute, there can be no doubt that it is given by the subsequent statute, 23 & 24 Vict. c. 144, the 1st section of which empowers the Judge Ordinary alone "to hear and determine all matters arising in the said court, and *to exercise all powers and authority* whatever, which may now be heard, determined, and exercised respectively by the full Court, or by three or more judges of the said Court, the Judge Ordinary being one." I therefore think the rules are valid under both the statutes.

It is further suggested that rule 22 is invalid, because it deprives the respondent of a substantial defence, but that is not so; it merely points out the time when, and the mode in which, the defence is to be made.

With regard to the order, I am of opinion that it must stand. My only doubt was, whether this is not such an answer as is required by the rules. The respondent might have answered, neither admitting nor denying the adultery, but alleging collateral matter, such as the Scotch domicil. If she had stopped there, or if she had added (although I am by no means sure it would have been necessary), "I have no other answer to make to the allegations in the petition," I should have thought it was open to her to have filed such an answer, raising the question of domicil; and this I under-

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stand to be in accordance with the opinion of the late and of the present Judge Ordinary in the cases cited. It never could have been intended that a respondent should be precluded by any general rule or order from setting up a defence which, if established, would be an answer to the petition. But this, as I read it, is not such an answer. The meaning of this answer, as I understand it, is that there should be a preliminary trial, either in fact or in law, or perhaps in both, of the question whether the matters alleged in the answer constitute a good defence to the suit; and in the event of that question being decided against the respondent, that she might afterwards be allowed to traverse the allegations in the petition, or to set up any other defence to those allegations, and to have a trial upon the merits. If that be the meaning of the answer, it is an infringement of the 22nd rule (which I think is binding on us), because it is an attempt to raise a preliminary objection to the jurisdiction without having appeared under protest. The matter is an important one, because, if there had been an appearance under protest, this preliminary question might have been raised and determined in a more concise and summary way than where it is raised in an answer like the present. I will add, in order that I may not be misunderstood, that even if the respondent had appeared under protest and objected to the jurisdiction, I think it would have been competent to her to have raised the same question of jurisdiction afterwards, when she put in her answer on the merits. My only doubt has been, whether the meaning of the answer be as I have stated. But inasmuch as its meaning is at least doubtful (and, according to my interpretation, it is wrong), the Court ought to set it aside as ambiguous and misleading, allowing the respondent to apply for leave to file a further answer. The order, therefore, ought, in my opinion, to be confirmed. Should the respondent be minded to apply for leave to file a further answer, and to plead to the jurisdiction, either with or without any other defence, in such a way as not to leave it doubtful whether it is intended as a preliminary or interlocutory answer only, she can do so consistently with this decision. But the answer, as it now stands, must be set aside.

PIGOTT, B. I am of the same opinion. Upon the first point, it is clear to my mind, from the language of the 8th, 9th, and

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53rd sections of the original statute, that the Court had power to make orders under that statute. The wording of the 1st section of the 23 & 24 Vict. c. 144, is, perhaps, not as careful as it might have been. The section speaks of "the Judge Ordinary of the Court," and then of "the said Court," and it then gives power to the Judge Ordinary to exercise the powers now exercised by "the full Court, or by three or more Judges of the said Court, the Judge Ordinary being one." The words "said Court" appear to mean the Court in contradistinction to the full Court. I think, therefore, that the Judge Ordinary also has power to make the rules under this Act.

I am further of opinion that the order appealed against is perfectly correct. It proceeds upon the view that the answer is not an answer to the merits. And I think no one can read the answer without seeing that the intention of the person who framed it is to say, "I do not answer to the merits, because the Court has no right to entertain the petition by reason of the want of domicil of the parties." That is the substance of the matter pleaded. The respondent says, in so many words, "The Court has no jurisdiction to entertain the said petition, or to grant the prayer thereof; and the Court ought not to take cognizance thereof," for the reasons before assigned, which are reasons of domicil. I am clearly of opinion that the Judge Ordinary was right in taking the view he did, that the answer is not, and was not intended to be, an answer to the merits of the petition; that, in fact, it meant to say, that the Court had no jurisdiction to enter into the merits of the petition. If that be so, the plea is in violation of the rule of the Court, which we have already determined was properly made by the Judge Ordinary acting as the Court. I do not know whether Dr. Spinks intended to rely upon one of the arguments that he addressed to us, namely, that we are bound to inquire whether it is a reasonable rule, and if it be not a reasonable rule, that this Court being a full Court, could abrogate it and act as if no such rule existed. But he cited no authority for that proposition; and it would be a very unreasonable course for this Court to take, because, although the rule is made by the Judge Ordinary alone, yet it has the same effect given to it by the statute as if it were made by a full Court; and if it were made by a full Court, it would be a strange thing that another full Court of co-ordinate jurisdiction—nay, the same Court, although differently constituted—should abrogate a rule made by a

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power equal to itself. If it were a decision on a question of law, the Court certainly would not take upon itself to overrule a decision of the same Court. The ordinary course would be that the question should go to a higher tribunal. And it seems to me equally unreasonable that we should abrogate a rule made by the same Court as ourselves. In the result, therefore, I am clearly of opinion that the order is correct. I quite agree that it should be left to the Judge Ordinary to determine upon what terms the respondent may be allowed to amend and to plead to the merits.

THE JUDGE ORDINARY. Upon the question of the validity of the rules made by the Judge Ordinary alone, I adhere to what I said in *Charles* v. *Charles*. (1) [The Judge Ordinary read his judgment upon this question in that case]. To this I have only to add that I agree with my Brother Pigott, that if the 1st section of the 23 & 24 Vict. c. 144 had been confined to conferring upon the Judge Ordinary the powers of the "full Court" there might be ground for the suggestion that the expression "full Court" was used in a technical sense as meaning the three judges who, before the passing of that statute, sat to hear suits for dissolution and nullity. There was no statutory definition of the full Court, but it consisted of a certain number of judges, of whom it was necessary that three should be present. But the section goes on to say, "or by three or more judges of the said Court." Now, the full Court never consisted of more than three judges. Something more, therefore, was intended than the full Court of three judges. It seems to me, therefore, that under this section also the Judge Ordinary alone has power to make the rules.

With regard to the order, I think that, looking at the practice which has prevailed since the Court was instituted, and looking also to the rule in which that practice is embodied, it must be taken to be the law of the Court as a matter of practice, that anybody who desires to raise the naked question of jurisdiction as a preliminary question to an investigation of the merits is bound to do it by appearing under protest. I have had some doubt, both upon this and upon the former occasion, whether that is a system which requires amendment, because I think that possibly it might lead to error, as was suggested by Dr. Spinks in the case of a

(1) Law Rep. 1 P. & M. 260.

person being abroad and not cognizant of his rights. At the same time it must be recollected that this plea to the jurisdiction as a naked and preliminary question is one that has always been treated by all Courts somewhat with disfavour. It has always been considered that it ought to be set up, if at all, very promptly indeed, and quite at the commencement of the suit. Therefore it may well be that the present practice is one with which no fault ought to be found, especially as there is this difference between the practice of this Court and of some other Courts, that the party who is called upon to answer has before him the citation and the petition which state what he is charged with, and he is at once placed in full possession of all the circumstances necessary to enable him to consult an expert, a person in the habit of practising in the court in which he is cited, and who ought to know what to do and the proper steps to take. That is the law, and I do not at present feel disposed to disturb it, even if I had the power. Now, what has happened in this case? The respondent upon being cited has put in this answer. In answer to the petition she says that George Wilson has always been domiciled in Scotland, that the respondent has always been domiciled in Scotland, that the marriage was contracted in Scotland, and that the adultery is alleged in the petition to have been committed in Scotland. Those are the facts which she alleges, and I agree with my Brother Bramwell, that if she had stopped there it would have been extremely doubtful whether that was not a perfectly good answer, because no particular form of answer is required in this court. The petitioner charges his wife with adultery, and all she says in answer is, "We are both domiciled Scotch people, the marriage was a Scotch marriage, and the adultery, if any, took place in Scotland." I am by no means sure that such an answer, if it had stopped there, would not have been perfectly good, because it might have been taken as an answer on the merits, but it goes on thus:—"The respondent says that by reason of the premises the Court has no jurisdiction to entertain the petition or to grant its prayer, and that the Court ought not to take cognizance thereof." That language, to my mind, clearly imports what the learned counsel has openly argued for, viz., that the respondent had a right to raise as a preliminary question the question of jurisdiction, intending afterwards, if that should be

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decided against her, to raise a further question on the merits. If no exception had been taken to this answer, and the question of jurisdiction had been decided as a preliminary question, and after that decision the petitioner had objected that she had let the time go by for answering to the merits and denying the adultery, I think her answer to that objection would have been irresistible. Pointing to the 5th clause of her answer, she would have said: "My answer was expressly confined to the question of whether the suit could be entertained by the Court at all, and, therefore, to say that I have admitted the adultery, or that I cannot now be allowed to deny it, is to do me the greatest injustice." That is my reading of the meaning of this answer. But I further agree with my Brother Bramwell, that if that be not the meaning of it, nobody can deny that it is most ambiguous, and it is quite plain that it is the duty as well as the right of this Court to see that a pleading is not allowed to stand upon the records of the Court and become the basis upon which the parties will go to trial, when it contains within it the germs of an argument which might lead to various results according to the interpretation which different people might put upon the language in which it is framed. It is the plain duty of the Court to put aside all ambiguous pleadings, and make the parties say what it is they mean to rely upon, and, therefore, upon that ground alone had I known that it was intended to be suggested that the answer was anything except an answer to the jurisdiction as a preliminary matter, I should have been disposed to set it aside. Now the order is that if the respondent does not answer to the merits within a certain number of days, this answer shall be struck out. Although she has not answered within the limited time, but has appealed to the full Court, which she was entitled to do (and I think it is a proper case for an appeal), it seems to me that she ought now to be entitled to answer to the merits. By answering to the merits I do not at all mean that she should make an answer that distinctly denies or admits the adultery; all that is required of her is that she should put upon the records of the Court something which in plain language imports that she has answered all that she intends to answer to the merits. As my Brother Bramwell has suggested, I think a good mode of doing that would be to strike out the 5th clause, and to add any words which will

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import what I have already indicated. However, I withhold a definite judgment upon the matter, because following what my learned Brothers have said, I am prepared to hear any application she may make for the purpose of putting an answer on the file which is in conformity with the judgment the Court has given.

Searle. The wife's costs of the appeal will not be taxed against the husband?

THE JUDGE ORDINARY. Certainly not.

Searle asked whether the husband's costs of the appeal should be deducted from any costs payable to the wife.

THE JUDGE ORDINARY. No. We think it was a proper case for appeal.

The respondent afterwards amended her answer, by leave of the Court, by striking out the 5th paragraph, and by traversing the adultery charged in the petition, and by making counter charges of adultery and cruelty against the petitioner. (1)

Attorneys for petitioner: *Newman, Dale, & Stretton.*
Proctor for respondent: *E. W. Crosse.*

WILSON *v.* WILSON AND HOWELL. (SECOND CASE.)

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Feb. 6.

Suit for Dissolution—Co-Respondent appearing under Protest—Dismissal from Suit.

On a petition for dissolution of marriage brought by the husband, the respondent appeared absolutely, the co-respondent under protest. The co-respondent filed an act on petition, in which he set out facts to shew that the Court had no jurisdiction to entertain the suit. The petitioner filed an answer thereto; and there was a replication; and the act on petition was set down for hearing. The petitioner then applied to the Court to be allowed to withdraw his answer to the act on petition, and that the co-respondent should be dismissed from the suit on the payment of his costs. The Court granted the application, notwithstanding the opposition of the co-respondent.

GEORGE JAMES WILSON petitioned the Court for a dissolution of his marriage with Mary Stuart Craigie Halkett Wilson by reason

(1) See next case.

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of her adultery with Archibald Howell. To this petition and the accompanying citation the respondent appeared absolutely, the co-respondent under protest. On the 4th of May, 1871, the proctor for the co-respondent filed an act on petition in which he alleged that the petitioner and respondent have always had and still have their domicil in Scotland, that the marriage and alleged adultery took place in Scotland, and that by reason of the premises the English Court for Divorce has no jurisdiction to entertain the petition or to grant the prayer thereof, and he prayed that the co-respondent should be dismissed from the suit. On the 30th of June, 1871, the solicitors for the petitioner filed an answer to the act on petition, and on the 8th of July, 1871, a replication was filed. On the 4th of August, 1871, the act on petition was set down for hearing by the proctor for the co-respondent.

1872. Jan. 30. *Searle* moved the Court on behalf of the petitioner to allow him to withdraw his answer to the act on petition and to dismiss the co-respondent from the suit on payment of his costs.

Bayford, on behalf of the co-respondent, objected. The Court has no authority at this stage of the proceedings to dismiss the co-respondent from the suit against his will. He referred to *Robinson* v. *Robinson & Lane*. (1)

Cur. adv. vult.

Feb. 6. THE JUDGE ORDINARY. In this case an application was made to the Court by the petitioner that the co-respondent should be dismissed from the suit on the payment of his costs. It was opposed by the co-respondent. The petitioner sues for a dissolution of his marriage by reason of the adultery of his wife with the co-respondent. The citation was served upon the respondent and co-respondent. The respondent appeared absolutely and filed an answer. In her first answer she merely stated facts tending to shew that the Court had no jurisdiction, and prayed that by reason thereof the petition should be dismissed. This was objected to, and it was contended that she should be compelled to answer on the merits, as the time for setting out those facts without more had gone by, and she should have appeared under protest; and the Court so held. (2)

(1) 1 Sw. & Tr. 362, at p. 386.

(2) See last case, ante, p. 341.

5 Jur. N.S. 392

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However, I gave her leave to add to her answer on the merits all the facts on which she relied to shew a want of jurisdiction, being of opinion that in the ultimate proceedings it might still be contended that this Court has no jurisdiction. This decision was affirmed by the full Court. In the mean time the co-respondent had entered an appearance under protest in the formal manner required by the rules of the Court in cases where parties intend to avail themselves of their strict rights on the question of jurisdiction. Having done that, he also took the next step in accordance with the rules, and filed an act on petition, simply, without alluding to the merits, setting out the facts on which he depended to shew that there is no jurisdiction. To this act on petition in the first instance the petitioner did not put in any answer, and whilst a discussion was going on between the petitioner and the respondent as to the form of her answer, the co-respondent pressed the petitioner to answer his act on petition. Something on that occasion was said by counsel to the effect that the petitioner did not care whether the co-respondent remained a party to the suit or not; but the petitioner did not then do, what he has now done, offer to pay the co-respondent's costs and to dismiss him from the suit. It was, however, argued on behalf of the co-respondent that if he were to remain a party to the suit he was entitled to have the question of jurisdiction which he had properly raised decided before the merits of the case were tried, so that if the decision were against him, he might then take part in the trial, and accordingly the Court ordered the petitioner to file an answer. The petitioner now says that he wishes to withdraw his answer, to pay the co-respondent his costs, and to dismiss him from the suit. Substantially the co-respondent, by his counsel, maintains, "I am a party to the suit, and you have no right to dismiss me against my will," and he refers to the case *Robinson* v. *Robinson and Lane.* (1) In that case, however, it was only held that the Court could not dismiss a co-respondent from the suit after the parties had joined issue and gone to trial. If the co-respondent be right in his present contention it may be very prejudicial to the other parties, because the petitioner and respondent may be quite willing to submit to the jurisdiction of the Court, and if the co-

(1) 1 Sw. & Tr. 362, at p. 386.

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respondent persists in refusing to be dismissed from the suit and will not answer on the merits until the question of jurisdiction has been decided, the case may come to a dead lock. I am not by any means certain what was the motive which actuated the legislature in directing that an alleged adulterer should always be cited as a co-respondent. It may have intended to benefit either the petitioner or the co-respondent; and regarding the matter from one point of view, it may be fairly predicated that the provision was intended to benefit the petitioner, as the co-respondent is made liable for the costs. In another aspect, however, it is easy to conceive that in that section the object was to enable any one charged with adultery to take part in the proceedings for the purpose of maintaining his innocence. In this case, in whichever way the matter is viewed, the result is the same. If the benefit of the petitioner were intended, the petitioner himself proposes to waive such benefit; and if that of the co-respondent, it can only be secured by his answering on the merits, and so taking part in the proceedings. These considerations arise on the merits of the present application; but on the form I apprehend there is no doubt. If the co-respondent be not dismissed now, what will be the end of the proceedings? The act on petition will remain on the file as well as the answer, and the petitioner will be obliged to fight out the question of jurisdiction with the co-respondent; a question of great importance in which the law is in a very unsatisfactory state, and one of so much interest to both parties that probably it will be carried to the House of Lords. Suppose the litigation carried out to an end, and that a year hence it be decided that the co-respondent is right and this Court has no jurisdiction. What then? Why, that very thing will be done which the Court is now asked to do, namely, the co-respondent will be dismissed from the suit. The form of the proceedings makes this quite plain for the act on petition concludes with a prayer, "Wherefore the said E. W. Crosse, referring to the affidavits and proofs to be by him exhibited in verification of what he so alleged, prayed that his party should be dismissed from the suit." That is, the act on petition prays for the very thing which the co-respondent says this Court cannot do. And the replication to the answer concludes, "Wherefore the said E. W. Crosse prays as before." It seems to

me his prayer ought to be granted at once. If he goes on and is successful, the only result will be he will be dismissed from the suit, which is the same as will be attained by the petitioner withdrawing and refusing to continue the contest with him. The petitioner says in fact, "I admit you are right, the Court has no jurisdiction in respect to you." What the petitioner asks may therefore be granted. He is at liberty to withdraw his answer, and the co-respondent will be dismissed on the payment of his costs by the petitioner. I think he should have his costs of appearing under protest, and of his act on petition, and also of the motion to compel the petitioner to answer to the act. But the costs of the petitioner on the present motion will be deducted from those the co-respondent is otherwise entitled to.

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Attorneys for petitioner: *Newman, Dale, & Stretton.*
Proctor for co-respondent: *E. W. Crosse.*

HULSE *v.* HULSE AND TAVERNOR, THE QUEEN'S PROCTOR INTERVENING.

1871 *Nov.* 16.

Evidence—Intervention of Queen's Proctor—Charge of Adultery—Primâ facie Evidence of Identity—Costs against Co-Respondent.

Upon the trial of an issue of adultery raised by the Queen's Proctor, intervening to shew cause against a decree nisi being made absolute, the Court does not require such strict proof of the identity of the person charged with adultery as upon the trial of such an issue in a suit between husband and wife.

The petitioner having had notice of the time when, the place where, and the person with whom he was alleged to have committed adultery, and evidence being given that a person passing by the petitioner's name and giving a card with the petitioner's name printed upon it, had been guilty of the alleged acts of adultery at the time and place and with the person specified, the Court *held* that there was primâ facie evidence of identity, and in the absence of evidence to rebut it, found the petitioner guilty, and dismissed his petition.

A decree nisi having been pronounced with costs againt the co-respondent, the decree was rescinded on the ground of the petitioner's adultery committed subsequent to the date of the decree; but the order condemning the co-respondent in costs was not rescinded.

THIS was a petition by Samuel George Hulse for a dissolution of marriage on the ground of his wife's adultery; and the adultery

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having been proved, a decree nisi was pronounced with costs against the co-respondent, on the 1st of April, 1870.

The Queen's proctor afterwards intervened, and alleged that the petitioner had been guilty of adultery since the date of the decree. (1) The allegation was denied by the petitioner, and the cause came on for hearing before the Judge Ordinary.

The effect of the evidence produced in support of the charge was, that a man calling himself Hulse, and passing by that name, had been in the habit of sleeping with a woman named Downs, at lodgings in Denbigh Street, Pimlico, since the date of the decree, and that he afterwards lived with Downs at lodgings in Morton Place, Pimlico, where he gave the landlady his card, on which was printed, "Samuel George Hulse, Junior Army and Navy Club."

Searle, for the petitioner, called no witness, but submitted that there was no evidence of identity.

Denman, Q.C., and *Archibald*, were for the Queen's Proctor.

THE JUDGE ORDINARY. The issue raised in this case differs from the issue of adultery raised in a suit by wife against husband, or husband against wife, where one is claiming a divorce on the ground of the adultery of the other. In such a suit, when undefended, or even if defended (for collusion is possible) it is necessary clearly to prove the identity of the respondent in order to establish the adultery. But this is not such a suit The Queen's Proctor intervening in the discharge of a public duty to shew cause against the decree nisi being made absolute, alleges that since the date of the decree the petitioner has been guilty of adultery. In such a suit there is no reason to doubt but that the petitioner will contest the matter and refute the evidence if he can. It is not disputed that the evidence is sufficient to establish the charge of adultery if there be proof of identity. Now the Queen's Proctor, in his plea, which was filed as far back as April last, has given the petitioner full particulars of the charge made against him, telling him the place where, and the person with whom, and the date when the alleged adultery was committed. Evidence is now given that a man passing under the name of the petitioner lived in the

(1) Law Rep. 2 P. & M. 259.

house mentioned in the Queen's Proctor's plea, and committed adultery there at the time and with the person specified in the plea; and that the same man afterwards took lodgings at Morton Place, where he gave a card on which were the names, "Samuel George Hulse," corresponding with the names of the petitioner. The strong inference is that this man was the petitioner, although the proof is not as clear as would be required if this were a question of identity arising in a suit between husband and wife. I am of opinion that a primâ facie case of identity has been established, and full notice of the charge having been given to the petitioner, he is bound to produce evidence to rebut it. As no evidence is forthcoming on his behalf, the decree nisi will be reversed, and the petition dismissed.

Searle. The adultery was not committed until after the decree nisi; and the reversal of the decree on that ground is no reason for relieving the co-respondent from his liability to costs. The Court will not reverse that part of the decree which condemns the co-respondent in the costs of the suit.

THE JUDGE ORDINARY. The decree nisi was rightly pronounced, and the subsequent adultery of the petitioner does not affect the petitioner's right to the costs of obtaining the decree from the co-respondent, who was proved to have committed adultery with the respondent. The order which condemns the co-respondent in costs must therefore stand.

Solicitor for petitioner: *Vyner*.

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Nov. 28.

TEAGUE AND ASHDOWN *v.* WHARTON.

Administration—Nominee of Next of Kin—20 & 21 Vict. c. 77, s. 73.

If the next of kin of a deceased are unable to agree amongst themselves which of them shall take administration of his estate, and are all willing that such administration shall be granted to a nominee who has no interest therein, that will not be a special circumstance to justify the Court in making a grant to such nominee under 20 & 21 Vict. c. 77, s. 73.

EMILIA HARVEY JEFFERIES, wife of James Robert Jefferies, of Spring Grove, Isleworth, Middlesex, died on the 2nd of July, 1871, having made a will, dated the 14th of October, 1870, in which she exercised a power of appointment over certain property in favour of her husband, and constituted him sole executor.

Mr. Jefferies died on the same day as his wife, but not at the same place. He left a will, dated the 15th of March, 1870, in which he bequeathed the whole of his property to his wife, and appointed her sole executrix. If Mrs. Jefferies survived her husband, her next of kin and the persons entitled to her property were her brother, Charles Robert Teague, and her sisters, Louisa Sarah Wharton (wife of Charles Hubert Wharton), Fanny Maria Ashdown (wife of Middleton Ashdown), and Elizabeth Ann Owen, widow.

Litigation having arisen in this court on the question whether Mr. or Mrs. Jefferies survived the other, a representation was required to the estate of Mrs. Jefferies, and accordingly an application for a grant of administration was made by the plaintiffs Charles Robert Teague and Mrs. Ashdown, which was opposed by the defendant Mrs. Wharton. Ultimately it was arranged amongst the next of kin that administration of the estate of Mrs. Jefferies should be applied for under 20 & 21 Vict. c. 77, s. 73, to be granted to Mr. James Waddell as the nominee of all the next of kin; and such an application was made to the Court on the 7th of November, 1871, but the motion was ordered to stand over in order that the husband's representatives should receive notice of it. They, however, declined to interfere.

Dr. Tristram, for the defendant, renewed the motion. If the Court will grant the application it will prevent litigation amongst

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the next of kin of Mrs. Jefferies, and the party appointed administrator will at once proceed to try the matter in dispute with the representatives of Mr. Jefferies. All the next of kin are anxious that Mr. Waddell should be appointed. [He cited *Farrell* v. *Brownbill*. (1)]

Inderwick, for the plaintiffs, assented to the application.

Cur. adv. vult.

Nov. 28. LORD PENZANCE. I took time to consider whether the Court, under the circumstances, could make a grant of administration of the goods of the deceased, in accordance with the wishes of the next of kin, to their nominee. There seemed to me at the time a great difficulty in acceding to such an application. I was referred to *Farrell* v. *Brownbill* (1), in which I had done something similar. In that case the next of kin had entered into litigation as to the person who should take administration, a petition and answer had been filed, and other pleadings had followed, when finally the parties came to an arrangement to stop litigation; and in order to carry it out, the Court made a grant to a nominee of the litigants under the 73rd section of the Probate Act. I decided that case on the authority of one cited, *In the Goods of Joshua Holroyd*, which has not been reported. I have, however, sent for the papers therein, and I find that the next of kin joined in a request that the administration should be granted to a particular individual, on the special ground that that individual was the executor under their father's will, and that the property to be administered in reality was part of their father's estate. It was, therefore, reasonable that the executor should continue to administer the property; but that case is no authority for the general proposition that if all the next of kin agree to nominate some person to take administration in their place, the Court will make a grant to such nominee. In a case decided lately, *In the Goods of Richardson* (2), the Court refused, in the absence of special circumstances, to make a grant under the 73rd section of the Probate Act to the nominee of the next of kin, and it pointed out what an inconvenient practice it would be to make grants in the manner asked

(1) 3 Sw. & Tr. 467; 33 L. J. (P. M. & A.) 185. (2) Ante, 244.

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for. "If all suitors in this court and persons entitled to grants were persons of intelligence and knowledge of business matters, such a rule might be unobjectionable. Persons of intelligence and education knowing their own rights, may be allowed, without objection, to transfer to third persons their right of dealing with property in which they alone are concerned. But the Court must bear in mind that suitors and persons entitled to grants in this court are many of them persons who have no opportunity of knowing their own rights, and are not aware of the dangers that may beset them if they transfer these rights to other persons. It would therefore be unwise of the Court to depart from the old-established rule, that a grant of administration must be made to the person who is by law entitled to the property." The more I consider the matter, the more I am satisfied that that is the way in which I ought to act. There are no such special circumstances in this case as to take it out of the ordinary rule. I shall, therefore, make the grant to one of the next of kin, or, if they all renounce, to some other person who has a sufficient interest in the property.

Attorneys for plaintiffs: *Robson, Tidy & Herbert.*
Attorneys for defendant: *Spyer & Son.*

Nov. 28.

IN THE GOODS OF W. COLES.

Will—Paper not clearly Testamentary—Intention.

The deceased executed in the presence of two witnesses a paper, which commenced, "I have given all that I have" to A. and her two sons. It contained directions in what way the deceased desired his property to be distributed; but without any direct reference to his death. There was evidence that he executed it as his will:—

Held, that it was testamentary, and might be admitted to probate.

WILLIAM COLES, of Victoria Terrace, Caledonian Road, Middlesex, died on the 26th of May, 1871. On the 18th of June, 1870, he executed, in the presence of two witnesses, a paper to the following effect:—"I have given all that I have to Bertha Chamberlain and her two sons, commonly called and known as Joseph Brailey Coles, and Henry John Coles; they are to pay to my sister, Mrs.

Charlotte Gent, three and sixpence per week as long as she lives. After her death to pay her son William Gent three and sixpence per week so long as he lives, the residue to be equally divided between Bertha Chamberlain, Joseph Brailey Coles, and Henry John Coles, share and share alike. After Bertha Chamberlain's death John Brailey Coles to have the east of Victoria Terrace, now occupied by, &c., and Henry John Coles to have the west of Victoria Terrace, now occupied by, &c., the residue to be equally divided between them, share and share alike." Opposite the signature of the deceased were the words, "Mr. S. S. Williams, Mr. Evans, trustees."

The paper was written by Mr. Gray, one of the attesting witnesses, at the dictation of the deceased, who distinctly directed him to use the words, "I have given," at the commencement of the will, saying that nothing would be plainer.

After the paper had been executed, the deceased gave it to Mr. Gray, telling him that as soon as the breath was out of the deceased's body he was to take it to Mr. Williams, the trustee named in it.

Joseph Brailey Coles died in the lifetime of the deceased. Bertha Chamberlain renounced administration of the estate.

Inderwick moved for administration, with the will annexed, to be granted to Mr. Williams as the guardian nominated by Henry John Coles, one of the residuary legatees, who is a minor. He submitted that the intention of the deceased that this paper should operate on his death may be gathered from the paper itself or from clear evidence dehors, and the Court will have no doubt from the affidavits that such was the deceased's intention. It will, therefore, admit this paper to probate. [He referred to the *King's Proctor* v. *Daines*. (1)]

Clarke, for William Gent, the nephew, and only next of kin. In reading this paper the conclusion to be drawn is that the deceased had not his own death in view as the time of its operation. That being so, according to the case cited, the Court must have the clearest evidence before it that the instrument was intended to be a will, the onus probandi being upon the party setting it up.

(1) 3 Hagg. Eccl. 218.

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IN THE GOODS OF COLES.

There is no sufficient evidence before the Court to this effect. If the Court is of opinion that the paper is a will, Mr. Gent is entitled to administration, as one of the legatees having died in the lifetime of the deceased, a portion of the residue is undisposed of, and belongs to him as the sole next of kin.

LORD PENZANCE. The question is, is this paper testamentary? A case was decided by me some time ago (*Cock* v. *Cooke* (1),) of a somewhat similar character. The principle is plain that where a paper is intended by the testator to take effect after his death, it will be admitted to probate, whatever may be its form. Although this paper contains the word "given" instead of "give," the Court cannot hesitate to say that the testator meant that the property should pass on his death, he could not mean to make over all his property to the persons mentioned at once. It is, I think, obvious that there is a greater probability that the testator intended the parties to take on his death, than that he should denude himself of everything in his lifetime. This last supposition is most improbable. I think, therefore, the paper is testamentary.

The order made by the Court was that administration with the will annexed should issue to Mr. Williams as guardian of one of the residuary legatees, if within a week administration with the will annexed were not taken out by William Gent as next of kin. The costs of all parties to be paid out of the deceased's estate.

Attorneys: *Lovell, Son, & Pitfield.*

(1) Law Rep. 1 P. & M. 241.

SIDEBOTTOM AND HULME *v.* SIDEBOTTOM. 1872
Jan. 16.

Will—Residuary Legatee—Failure of Trust ascertained.

A deceased, by his will, devised and bequeathed the residue of his real and personal estate to trustees, in trust for the benefit of his children, but in case of the failure of such trust for such of his two brothers as should be living at the time of the said failure of trust ascertained. At the time of his death the testator had no child, and his wife was not enceinte; one brother died a fortnight after the testator:—

Held, that the failure of the earlier trust, although not known, was determined on the death of the testator, and the residue vested at that time in the brothers, and therefore that the executors of the deceased brother, on the citation and non-appearance of the other brother, were entitled to a grant of administration with the will annexed of the goods of the deceased.

THOMAS HADFIELD SIDEBOTTOM, late of Stayley, Cheshire, deceased, died on the 30th of January, 1871, having made a will bearing date the 5th of November, 1870, in which he appointed his brothers, Walter Sidebottom and James Sidebottom executors. In this will the testator disposed of the residue of his estate as follows:—"As to the residue of the real and personal property whatsoever and wheresoever, which may belong to me at my decease, I devise and bequeath the same unto my said brothers, Walter Sidebottom and James Sidebottom, their heirs, executors, administrators, and assigns respectively, upon the trusts following, that is to say, in case there shall be any child or children of mine living at my death or born in due time afterwards, who shall attain the age of twenty-one years, in trust for such child or children in equal shares, if more than one, and his, her, or their respective heirs, executors, administrators, and assigns respectively; and in case of the failure of the preceding trust, then in trust for such of them, my said two brothers, as shall be living at the time of the said failure of trust being ascertained (in equal shares if more than one), and their or his respective heirs, executors, administrators, and assigns absolutely." The testator died leaving a widow him surviving, but without having had any child born in his lifetime, or in due time afterwards. James Sidebottom survived the testator, but died on the 14th of February, 1871, having made a will in which he appointed his widow Margaret Sidebottom, and Otho

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Hulme, executors, who took probate thereof. Walter Sidebottom, the other executor and trustee, is insane. A citation having been taken out by the plaintiffs, the executors of James Sidebottom on the 19th of December, 1870, calling upon Walter Sidebottom to take probate or administration of the goods of the deceased, was duly served upon him, but no appearance thereto was entered on his behalf.

C. A. Middleton moved that administration with the will annexed be granted to the plaintiffs as executors of James Sidebottom, one of the residuary legatees named in the will of the deceased. The failure of the previous trust was ascertained, that is made certain, by the death of the deceased, and therefore the legacy vested in James Sidebottom at that period. [He referred to Jarman on Wills, 3rd ed., vol. i., p. 797, n. (d.)]

LORD PENZANCE. I think the reasons given are strong enough to induce me to grant this motion. The question is whether the failure of this trust in favour of the children was "ascertained" on the 14th of February, 1871, within the meaning of the bequest. If a child had been born in the testator's lifetime, and had survived the testator, but had died under the age of twenty-one, when would the failure of the trust be ascertained? Would it be "ascertained" when the death became known, or when the death happened? If known, known to whom? The child might die abroad, and his death not be known to his relations for years after it had happened, but surely the trust would have failed upon the occurrence of his death, not at the moment that intelligence of his death reached anybody. The word "ascertained" therefore must, I think, be read as "made certain," and this certainty may be arrived at by the light of after events. From these events, it appears in this case that the possibility of the testator leaving a child was in fact at an end when he died. I am therefore of opinion that the failure of the trust was then "ascertained," and that it is reasonable I should make the grant.

Proctor: *Ayrton.*

IN THE GOODS OF ADAMS. 1872

Will—Printed Form—Partly filled up in Ink, partly with a Pencil—Probate. *Feb.* 6.

The deceased executed a printed form of a will. The blanks were filled up by the deceased in her own handwriting, partly with ink and partly with a pencil. Some portion of the writing in ink extended over that in pencil, and some words of the latter had been rubbed out and obliterated. The words in ink were sensible as read with the printed part of the will. The attesting witnesses did not see the writing when they attested the will:—

Held, that the words in pencil were deliberative only, and probate was granted without them.

LOUISA CHARLOTTE ADAMS, late of Camberwell, Surrey, spinster, died on the 27th of October, 1871, having executed a will dated the 25th of April, 1863, in which she appointed Mr. George Saul executor. The will was originally a lithographed form, with spaces left for the names of the legatees to whom the deceased intended to give the effects in her house at her death, and also the residue of her personal estate. The first space was filled up in the handwriting of the deceased, as follows:—"I give, devise, and bequeath unto" (in print) "Mr. Gabriel Kennard, son of Mr. Kennard, of Frith Hall, East Farleigh, Kent, the sum of ten pounds; to my kind friends, Miss Saul, Bow Lodge, Bow Road, Middlesex, and Mr. G. Kennard, Frith Hall," (these words were written in ink, "G. Kennard, Frith Hall" over the words in pencil, "Middlesex, Mr.," then followed in pencil) "Kennard, East Farleigh, Kent, five pounds each for rings; to the daughters of Mr. William Austen, Marden, Kent, the rest of my effects" (then in print) "all and every my household furniture, linen and wearing apparel, books, plate, pictures, china, and also all and every sum and sums of money which may be found in my house, or be about my person, or due to me at the time of my decease. And also all my stocks, funds, and securities for money, book debts, money on bonds, bills, notes, or other securities, and all and every other my estate and effects whatsoever and wheresoever, both real and personal, whether in possession or reversion, remainder or expectancy, unto" (a blank space of four lines followed) "to and for *their* own use and benefit absolutely." The word "their" was written in ink. The words in pencil had been partly rubbed out. The surviving

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attesting witness, Mary Norman, stated that the deceased wrote something with a pen and ink on the will immediately before the execution, but what, she could not say. When the witnesses signed their names on the second side the first side was turned back, and they did not see the writing on it. The persons interested in the pencil writing renounced all claim to the residue left thereby.

Searle moved for administration, with the will annexed, to be granted to Miss Saul, as one of the residuary legatees named therein (the executor having renounced probate) without the pencil writing. If pencil and pen writings are mixed up together in a will, it has always been held that the latter shews a final, the former a deliberative intention only; and the pencil additions are omitted from the probate. In this case, without the pencil writing, the sense of the instrument is tolerably clear: *Hawkes* v. *Hawkes* (1); Williams' Executors, pt. 1, bk. 2, ch. 2, s. 5.

LORD PENZANCE. If the part written in ink is taken with the printed words, the will is capable of being read straight through; but, beyond the writing in ink, there is some pencil writing, and some of the words in pencil are under those in ink. It is clear, therefore, that some of the dispositions are intended to be superseded by others; and, that being so, the presumption is, that the writing in ink is the will, and not the pencil writing, especially as the former is of such character as to work in with the printed matter. Not only is the pencil writing written over, but it is partly rubbed out. I conclude, therefore, that it was the intention of the deceased to supersede the pencil writing, and it will be excluded from the probate.

Attorneys: *Monckton & Co.*

(1) 1 Hagg. Eccl. 321.

IN THE GOODS OF PUNCHARD. 1872 *Feb.* 20.

Will—Executor according to the Tenor—Trustee.

Unless the Court can gather from the words of the will that a person named trustee therein is required to pay the debts of the deceased, and generally to administer his estate, it will not grant probate to him as executor according to the tenor thereof.

WILLIAM PUNCHARD, of Rheidol Terrace, Islington, died on the 16th day of January, 1872. He left a will dated the 19th of August, 1871, which commenced, "By the grace of God, Amen. I, William Punchard, being of sound mind, do write my will and testament. I have four houses, 4, 5, 6, 7, Rheidol Terrace, in the parish of St. Mary, Islington, and a stable." It then disposed of these houses, and continued, "I leave a house on long lease, No. 47, Chalfont Road, Liverpool Road, that I wish to be sold to pay expenses and legacies; the ground rent of it is 5*l.* per year. I wish P. A. Collins to act as trustee to this estate. My pony and shay and pianoforte to be sold, and the money divided in equal shares; also all my furniture, clothes, and plate, I leave to Mrs. White, to give to her brother and my nephew, which she do not want. Mr. C., of Doctors' Commons, to be the attorney; and I leave the following legacies. Debts, I have none." The will concluded with several legacies, but contained no bequest of the residue. The next of kin renounced administration with the will annexed, and consented it should be granted to Mr. Collins.

Feb. 13. *Searle* moved for probate to be granted to Mr. Collins, as executor according to the tenor of the will. As no property is vested in him as trustee, and none of the ordinary duties of a trustee imposed upon him, the testator must have meant that he should administer the estate, and if so, the Court will grant probate to him as an executor according to the tenor of the will. [He referred to *In the Goods of Montgomery* (1); *In the Goods of Collett* (2); *In the Goods of James Jones* (3); *Moss* v. *Bardswell* (4); *In the Goods of Baylis.* (5)]

Cur. adv. vult.

(1) 5 No. of Ca. 99.
(2) Deane, 274.
(3) 2 Sw. & Tr. 155.
(4) 3 Sw. & Tr. 187; 29 L. J. (P. M. & A.) 117.
(5) Law Rep. 1 P. & M. 21.

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IN THE GOODS OF PUNCHARD.

Feb. 20. LORD PENZANCE. This was an application to the Court to grant to a person named Collins probate of the will of the deceased as an executor according to the tenor thereof. The testator commences his will by disposing of various houses, and one particular house he orders to be sold for the payment of expenses and legacies. This introduces the clause on which the application is founded. The words are, "I wish P. A. Collins to act as trustee to the estate." In a subsequent part of the will the testator says he has no debts. Is Mr. Collins executor according to the tenor of the will? I have considered the cases cited, and the argument addressed to me on the last court day. The first case was *In the Goods of Montgomery* (1); Sir H. J. Fust says, "It would appear primâ facie that the paper was not intended as a will, but as a deed to convey the property to two gentlemen in trust. . . . If there had been trusts to be executed immediately, or in the lifetime of the testatrix, though it could still not have effect as a deed, it would not operate as a will. What are the trusts? Why, that these gentlemen 'as soon as conveniently may be after my decease,' are to collect the proceeds of her personal estate, pay her debts and the legacies she has specified. Under these circumstances, I am quite clear that the paper cannot have effect as a deed, and may have effect as a will, for all the trusts are to be executed after the death of the deceased. The question then is, whether the parties named as trustees are executors according to the tenor, or universal legatees in trust. Looking at the whole of what they are to do, I think, under the circumstances, the acts are to be done by them as executors, and not as trustees generally, and I therefore decree probate to them as executors according to the tenor of the will." The acts to be done were to collect the proceeds of the personal estate, and to pay the debts and legacies. The Court, therefore, held that although they were called trustees, they were to perform the duties of executors. Another case cited was *In the Goods of Collett.* (2) In that case, also, there was a similar direction to pay debts, a general power of administration cast upon the person called a trustee. A third case was referred to, *In the Goods of Baylis.* (3) There the will commenced with these words: "I

(1) 5 No. of Ca. 99. (2) Deane, 274. (3) Law Rep. 1 P. & M. 21.

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direct that all my just debts, funeral and testamentary expenses, be duly paid and satisfied as soon as conveniently may be after my decease." The testator gave to the trustees all his personal estate, with directions to convert it into money, and divide it amongst his children. Before, however, it could be divided, the trustees had to comply with the directions in the first clause of the will, and pay the debts, funeral, and testamentary expenses, which was part of the office of executor. Applying those cases to the one in hand, I find no parallel between them. In this case nothing was bequeathed to the person called a trustee; there is nothing for him to do as such, no duty to perform. The whole matter resolves itself into this: he is said to be a trustee. That is not enough, and I must reject the application.

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IN THE GOODS OF PUNCHARD.

Attorney: *C. G. Rushworth.*

BURDON *v.* MORGAN.

Feb. 20.

Limited Administration—Assignee—Property assigned not belonging to Assignor in his own Right.

A., under the impression that he was entitled in his own right to a share in the residue of a deceased's estate, assigned it for a sufficient consideration to B. At the time he executed the deed of assignment the share formed part of the estate of his father, to whom he was administrator. On the death of A. the Court refused to grant administration to the executor of B. of the estate of the father, limited to A.'s interest in such share, the value of which had been ascertained in the Court of Chancery, but made such grant as would enable him to institute proceedings in that court, and to receive whatever he might be held entitled to by it.

SAMUEL ROBERTS, of St. Nicholas, Guildford, died on the 31st of January, 1836, having made a will and codicil, dated the 30th of July, 1832, and the 4th of September, 1833, respectively, in which he left the residue of his real and personal estates to trustees in trust to pay the rents and profits thereof to his son, William Roberts, during his life, and on his decease to convert the same into money, and divide the proceeds amongst his eleven grandchildren (of whom William Longhurst and Samuel Longhurst were two), share and share alike, as and when they should respectively attain their respective ages of twenty-one years; the interest, divi-

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dends, and annual proceeds of each legacy or share to be in the mean time paid and applied by the trustees to the maintenance and education of such grandchildren respectively; and if any or either of such grandchildren should die before such legacy or share or any part thereof should become payable, without leaving any child or children surviving, his share to be divided amongst the surviving grandchildren; and in case he left any children, his share to go to those children. The will and codicil were proved by the executors therein named, on the 2nd of March, 1836. William Longhurst, one of the grandchildren above-mentioned, having attained the age of twenty-one years, died, intestate and unmarried, before 1851; and Samuel Longhurst also died intestate on the 25th of April, 1851, leaving three children, Samuel Miles Roberts Longhurst, William Roberts Longhurst, and Cornelia Longhurst, now Cornelia Morgan, wife of David Morgan, surviving him. William Roberts Longhurst took out administration to his father, Samuel Longhurst, in the month of February, 1860, and to his brother, who died in September, 1851, on the 21st of December, 1861, but he died intestate on the 21st of March, 1865, leaving Cornelia Morgan, his only next of kin, and the only person entitled in distribution to his personal estate. By an indenture bearing date the 21st of January, 1862, to which William Roberts Longhurst was a party, both in his own right and also as administrator of his brother Samuel Miles Roberts Longhurst, for certain considerations therein mentioned, the said William Roberts Longhurst assigned to Thomas Burdon, his executors, administrators, and assigns, all and singular one equal undivided moiety, or half part, or share of, or in one equal undivided tenth part or share, and all and singular other the part or share, parts or shares of him the said William Roberts Longhurst, as well original as accruing of, and in all and singular the moneys and produce to arise from the sale and conversion of the real and personal estate of the said testator Samuel Roberts as directed to be sold after the decease of the said William Roberts, the son, as aforesaid. At this time William Roberts, the tenant for life, was still living, and it was supposed that William Roberts Longhurst was entitled (under the words of the will of Samuel Roberts, above given), in his own right, to a moiety of his father's share of and in the moneys and produce to arise from the

sale and conversion of the real and personal estate of Samuel Roberts directed to be sold, and also to a twentieth part of the share of William Longhurst, then deceased, who, as also Samuel Longhurst, was one of the eleven grandchildren of Samuel Roberts; but by an order in Chancery in a suit (*Haydon* v. *Rose*) to administer the estate of Samuel Roberts, made on the 27th of July, 1870, it was declared that William Longhurst and Samuel Longhurst took a vested interest in their shares of the residuary estate of Samuel Roberts, on attaining twenty-one years, and such interest was not divested by their respective deaths in the lifetime of the tenant for life. Thereupon a sum of £1774 13*s.* 4*d.* 3 per cent. Bank Annuities, was placed to the account of the share of Samuel Longhurst, deceased, of which sum £1747 4*s.* 10*d.* represents the said deceased's one-eleventh part of the residuary estate of Samuel Roberts, and £27 8*s.* 6*d.* the dividends that had accrued thereon. This sum, as also the sum of £25 19*s.* 1*d.* further dividends, and also a sum of £106 0*s.* 4*d.* cash in the hands of the representative of William Longhurst deceased, being the distributive share of Samuel Longhurst, as one of the next of kin at his death, and any other part or share, parts or shares, original or accruing, of Samuel Longhurst, of and the moneys and produce still to arise from the sale and conversion of the residuary estate of Samuel Roberts form the unadministered estate of Samuel Longhurst, deceased. Thomas Burdon died on the 20th of June, 1871, having by his will appointed Thomas Alford Burdon one of his executors, who took probate thereof. Thomas Alford Burdon cited by advertisement Mrs. Morgan to take administration with the will annexed of the unadministered estate of her father Samuel Longhurst, but she entered no appearance to the citation.

Feb. 13. *C. A. Middleton* moved the Court to grant administration of the unadministered estate of Samuel Longhurst to Thomas Alford Burdon, as executor of Thomas Burdon, the assignee under the indenture dated the 21st of January, 1862, limited to a moiety of the several funds above set out, as forming the unadministered estate of Samuel Longhurst, and limited also to all other the part or share, parts or shares (if any), as well original as accruing, of or in the moneys and produce to arise from the sale and conversion

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of the real and personal estate of the said testator, Samuel Roberts, deceased, which being part of the unadministered personal estate of the said Samuel Longhurst, deceased, was or were effectually assigned by the said indenture of the 21st of January, 1862, to the said Thomas Burdon, deceased. It is admitted that William Roberts Longhurst took no direct interest in the estate of Samuel Roberts, assigned by the indenture, but if the deed be inoperative in its original intention, it will be construed so as to fulfil its original intent as nearly as possible: *Chester* v. *Willan.* (1) At the time the indenture was executed W. R. Longhurst was administrator of his father, and therefore the indenture conveyed all his beneficial interest, both in that character as well as in his own, in the estate of Samuel Roberts to Mr. Burdon. If the subject-matter of the assignment had been capable of legal assignment, as leaseholds, it would have passed, and so will an equitable assignment: Sheppard's Touchstone, p. 90, n. W. R. Longhurst's interest in his father's estate is one half Samuel Longhurst's share in the estate of Samuel Roberts, the amount of which has been ascertained by the Court of Chancery; that, therefore, clearly passes under the deed, the title being as complete as possible. As regards the interest of Samuel Longhurst in his brother William's share, it is not so clear, as the indenture in terms only extends to the share of Samuel Longhurst to arise out of the residue of Samuel Roberts' estate. [He referred to *Depit and Chapot* v. *Delerieleuse.* (2)]

LORD PENZANCE. It seems to me it will not be fit or necessary for this Court to determine the rights of the applicant under the deed. It should rather grant him such an administration as will enable him to determine that question in another court.

Cur. adv. vult.

Feb. 20. LORD PENZANCE. This was an application to me to make a grant of administration to an assignee interested in the estate of the deceased. The assignor was the son of the deceased, and at the time he executed the deed he imagined he had an interest in the estate of his great grandfather Samuel Roberts, which he intended to assign to Thomas Burdon. In truth, how-

(1) 2 Wms. Saund. 97 b. (2) 2 Sw. & Tr. 131; 30 L. J. (P. M. & A.) 86.

7 Jur. N. S. 196.

ever, he had no such interest; but his father, under the circumstances, and according to the provisions of the will of Samuel Roberts, was at that time entitled to the property. However, that very share ultimately devolved upon the son as one of the persons interested in the estate of his father. At the time the deed was executed the father was dead, and the son was acting as the administrator of his estate; but he did not sign the deed in that character and only in his own right. The application is that I will grant administration of the unadministered goods of Samuel Longhurst, the father, limited to a moiety of £1774 13*s.* 4*d.* 3 per cent. bank annuities, that being the amount ascertained by the Court of Chancery of the share of Samuel Longhurst in the residuary estate of Samuel Roberts, with the interest thereon, which share passed under the deed of assignment to Thomas Burdon. Now, the first objection to the grant is that the assignor, at the time he executed the deed, had no title to the property which he disposed of by it in his own character. To this it is answered, that although he had no title in his own right, he had as administrator of his father, and that that ought to enure to the same end. Again, it may be replied to that, that the matter is not free from doubt. If a person comes to this Court having no general interest in the estate of the deceased, he must shew clearly that he has a right to some particular sum or fund, otherwise he can only obtain authority to assert his right in another Court. I may also advert to the fact that the person who is primarily entitled to a grant is in America, and has not been personally served with the citation. I think, therefore, the Court is not warranted in going further than to make such a grant as will enable the applicant to take proceedings in the Court of Chancery; at the same time he should have a right to receive under it, whatever that Court may hold that he is entitled to.

Attorneys: *Greenway & Robins.*

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Feb. 20.

RAVENSCROFT *v.* RAVENSCROFT AND SMITH; THE QUEEN'S PROCTOR INTERVENING.

Matrimonial Suit—Decree Nisi with Costs—Damages assessed—Intervention of Queen's Proctor—Reversal of Decree.

In a suit for dissolution of marriage heard before the Court and a common jury, a verdict was found against the respondent and co-respondent for adultery, and damages were assessed. A decree nisi was thereupon made, with costs against the co-respondent. The Queen's Proctor intervened; and ultimately it was proved that the petitioner had also been guilty of adultery. The Court reversed the whole decree nisi, including the order for costs, and dismissed the petition.

THIS was a petition for dissolution of marriage presented by the husband by reason of the adultery of his wife with the co-respondent. The adultery was denied, and the question at issue was tried, before the Judge Ordinary and a common jury, on the 1st of July, 1870, when the jury found that the respondent and co-respondent had been guilty of adultery, and assessed damages at 100*l.* The Judge Ordinary made a decree nisi, and condemned the co-respondent in the damages assessed against him and in the costs of the suit. No application was made at the hearing for the wife's costs. The Queen's Proctor subsequently intervened, and alleged that the petitioner had been guilty of adultery with divers females, and also charged collusion and connivance. The petitioner denied all the charges, and the issues came on for trial before the Judge Ordinary and a special jury on the 7th and 8th of February, 1872. The jury returned a verdict that the petitioner had been guilty of adultery, and the Judge Ordinary signified his intention to dismiss the petition, but adjourned the further consideration of the matter, to enable an application to be made to the Court in reference to the part of the decree nisi which condemned the co-respondent in costs.

Dr. Deane, Q.C. (*Dr. Swabey* with him), for the petitioner, submitted that the Court should not reverse that part of the decree nisi which condemned the co-respondent in the costs of proving adultery against him. The adultery of the petitioner had no connection with the misconduct of the wife, and nothing like connivance

nor collusion has been shewn on his part. Except for misconduct of that character, the Court will not deprive a petitioner of the benefit of a decree for costs he has obtained against a co-respondent. In an action for crim. con. it was only a case of gross immorality or connivance on the part of the husband that could be offered in mitigation of damages: *Bromley* v. *Wallace.* (1) Moreover, in this case, as the jury have assessed damages against the co-respondent, the Court will not deprive the petitioner of the benefit of their verdict to that extent, as justice does not require it, and the costs will necessarily follow a verdict for damages.

[They referred to *Seddon* v. *Seddon and Doyle* (2); *Bremner* v. *Bremner and Brett* (3); *Ellaytt* v. *Ellaytt, Taylor, and Halse.* (4)]

Dr. Spinks, Q.C., for the co-respondent. The case of *Seddon* v. *Seddon and Doyle* (2) shews that, even where damages have been assessed, the Court will, under special circumstances, dismiss the suit against all the parties. In this case the petitioner has been proved to have been guilty of the grossest misconduct and immorality, and he ought not to be allowed to recover any costs.

THE JUDGE ORDINARY. The question for me to-day is, whether I will or will not refrain from enforcing that part of the decree nisi by which I condemned the co-respondent in the costs of the petitioner. I am not asked, and have not been asked, for an order upon the co-respondent to pay the damages assessed against him into court. When, on the previous occasion, the matter was before me, I proposed to reverse the decree nisi, unless within a fortnight it was shewn to my satisfaction that as against the co-respondent it should not be reversed. Now, the question of costs is one entirely within the discretion of the Court. It is a question which must depend upon the circumstances of each case. Without going fully into the matter, it is obvious that there may be a case in which, although the husband may have committed an act of adultery, the Court would hold that he is entitled to recover his costs against the co-respondent, whose adultery had been established; on the other hand, there may be cases, such as *Seddon* v. *Seddon*

(1) 4 Esp. 237.

(2) 2 Sw. & Tr. 640; 31 L. J. (P. M. & A.) 101.

(3) 3 Sw. & Tr. 378; 33 L. J. (P. M. & A.) 202.

(4) 3 Sw. & Tr. 503; 33 L. J. (P. M. & A.) 137.

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and Doyle (1), in which the Court would come to the conclusion that the petitioner's conduct was so bad that he ought never to have come to the court, and therefore that the co-respondent ought not to be condemned in costs. In the case before me the petitioner's conduct was of the grossest character, and therefore I am of opinion that the decree as to costs must be reversed. Then it was said that the reversal of the decree nisi ought not to affect the question of damages, and that the petitioner should have time to apply to the Court for an order that they be paid into the registry. As that is not before me at present, I need say nothing about it; but to save the parties having to argue the matter over again on a subsequent occasion, I will give my opinion now.

The statute which regulates the intervention of the Queen's Proctor (23 & 24 Vict. c. 144, s. 7) directs that, on cause being shewn, the Court shall deal with the case by making the decree absolute, or by reversing the decree nisi, or by making further inquiry, or otherwise as justice may require. The Court, therefore, seems to have the fullest power to deal with the case according as justice may require, taking into consideration the new aspect of it arising from the evidence offered by the Queen's Proctor. In the present instance, such evidence applied to the petitioner's conduct does indeed present it in quite a new aspect, and no one can doubt that if the jury had had such evidence before them, they never would have given damages at all. I have at present made no order on the subject of the damages assessed for their payment into Court. I take it that the principle is clear, that if a petitioner has obtained a verdict for damages, and the verdict is not followed up by any order or judgment of the Court, he has no legal title to them. Indeed, the words of the statute indicate that the petitioner has no legal right in respect of them, even when recovered. The words of the 33rd section (20 & 21 Vict. c. 85) are, "That the damages to be recovered shall be ascertainable by the verdict of a jury, and after the verdict has been given, the Court shall have power to direct in what manner such damages shall be paid or applied, and to direct that the whole or any part thereof shall be settled for the benefit of the children of the marriage, or as a provision for the maintenance of the wife." These

(1) Sw. & Tr. 640; 31 L. J. (P. M. & A.) 101.

words point to the conclusion that, when the legislature was dealing with this matter of damages, it had in view the dissolution of the marriage; for otherwise, if these provisions are to be carried out, even although the petition be dismissed, the Court would be making a settlement upon the wife when possibly she is still living with her husband. I think, therefore, that the husband has no legal right to the damages; and that even if an order were made for the payment or application of them, the Court would certainly not in this case direct that they should be paid to him.

The decree nisi will be entirely reversed, and the petition will be dismissed.

Proctors for petitioner: *Tebbs & Son.*
Attorney for co-respondent: *C. Wright.*

IN THE GOODS OF THOMAS PARNELL. *March* 12.

*Administration with the Will Annexed—Authority to a Guardian to appoint a New Guardian—*12 *Car. c.* 24, *ss.* 8, 9.

A testator in his will appointed certain persons to be guardians of his daughter, and in case of the death of either of such persons he authorized the survivor to nominate another person as guardian in the place of the one so dying:—

Held, that the 12 Car. 2, c. 24, s. 8, which enables a father to dispose of the custody and tuition of his minor child by will, sanctions his giving authority to a surviving guardian to nominate a person in the place of one who has died.

THOMAS PARNELL, of Hermitage Bridge, East Smithfield, Middlesex, died on the 14th of March, 1869, having executed a will, dated the 19th of May, 1862, in which he appointed William King Fossett, and Louisa Parnell, executors. He also nominated William King Fossett and Louisa Parnell guardians of his daughter, Clara Jane Parnell, during her minority; and further he directed that in case of the death of either the said William King Fossett or Louisa Parnell, it should be lawful for the surviving guardian to appoint another in the place and stead of the one so dying. On the 14th of June, 1869, probate of this will was granted to Louisa Parnell, one of the executors, power being reserved to Mr. Fossett, the other executor, to come

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in and prove the will subsequently. Louisa Parnell died on the 8th of September, 1871, having made a will, in which she did not appoint an executor, leaving part of the estate of the deceased Thomas Parnell unadministered. On the 16th of November, 1871, William King Fossett executed a deed, in accordance with the power given him in the will of Thomas Parnell, in which he appointed William Fossett to be a guardian, jointly with himself, of Clara Jane Parnell during her minority. Miss Parnell was still in her minority, being eighteen years of age. Mr. William King Fossett, on the 30th of December, 1871, renounced his right to probate and administration of the personal estate of Thomas Parnell, and consented that administration with the will annexed of the unadministered estate of the deceased should be granted to William Fossett, as substituted testamentary guardian of Clara Jane Parnell, the universal legatee for life named in the will, for her use and benefit, and until she attains the age of 21 years. An objection having been raised in the registry that, under the statute 12 Car. 2, c. 24, a father has no authority by will to direct another person to nominate a guardian to his child who is under age.

Bayford moved that administration should be granted accordingly. The 8th section of 12 Car. 2, c. 24, directs that any person, having a child under age, may, by his last will and testament in writing, in such manner, and from time to time as he may think fit, dispose of the custody and tuition of such child during its minority, or any lesser time, to any person or persons in possession or remainder; and such person, to whom the custody of such child shall be disposed or devised, may maintain an action on behalf of the child, and may take to the use of the child the profits of all lands belonging to him, and the management of his goods and chattels. The statute, therefore, does not merely authorize the father to appoint a particular person guardian, but makes use of the expression "dispose and devise." In Burns' Eccl. Laws, Wills, p. 146, it is said, in reference to this statute, that the guardian appointed by the father cannot nominate another, because it is a personal trust, and not assignable; but the authority there given, *Bedell* v. *Con-*

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stable (1) does not support the proposition that a father may not authorize by will another person to nominate a guardian for his child. It has been held that a testator may by will direct an individual to nominate an executor on his behalf. [He referred to *Darcy* v. *Lord Holderness.* (2)]

LORD PENZANCE. The question raised turns upon the construction of the statute 12 Car. 2, c. 24. That was not the first statute which related to the custody of minors; for, as regards females, there was an earlier one: 4 & 5 Ph. & M. c. 8. However, as I have said, the question before me arises on the terms of the statute, 12 Car. 2, c. 24. There would have been a difficulty if it had simply said that the father might appoint a guardian, but the terms are of a more general character. He may, says the statute, by his last will and testament, in such manner, and from time to time, as he may think fit, dispose of the custody and tuition of his child during its minority, or any lesser time, to any person or persons in possession or remainder. I cannot conceive language of a wider character. It does not authorize him to appoint a guardian—the word guardian is not mentioned—but to dispose of the custody of the child as he thinks fit. The testator here says it shall be in this fashion:—"I appoint A. B. and C. D. for life, and on the death of either, the person whom the other shall nominate." By these provisions he is only, I think, "disposing of the custody of his child" within the words of the Act. I am not aware of any legal precedents applicable to this point. As regards the case reported in Vaughan 177, the father gave the appointment to an individual, but did not authorize him to nominate some one else. It was held that he had no power to assign the office to another person. The note referred to in 1 Peere Wms., that an office of trust must be personally occupied unless it be granted to be occupied by a deputy, is not made applicable by anything that appears in the text. We come back, therefore, to the statute on which the case must turn. It is a useful statute, and there is no reason why the generality of its terms should be restricted in its interpretation. The grant may go.

Attorneys: *Satchell & Chapple.*

(1) Vaugh. 177. (2) 1 P. Wms. 703, n.

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March 12.

MORDAUNT *v.* MORDAUNT.

Matrimonial Suit—Insanity of Respondent—Dismissal of the Petition.

In a matrimonial suit, a jury having found that the respondent was in such a state of mind as to be unfit to answer the petition or to instruct an attorney for her defence, an order was made that no further proceedings should be taken in the suit until she recovered her mental capacity. After a period of two years, and on evidence that the respondent was not likely to recover, the Court, on the application of the petitioner, dismissed the petition so as to afford him an opportunity to appeal against the order.

THIS was a suit instituted against the respondent for a dissolution of marriage by reason of adultery. It having been alleged that the respondent was not of sound mind, and therefore unable to plead and to give instructions for her defence, her father, Sir Thomas Moncrieffe, was appointed her guardian, ad litem, for the purpose of raising the question as to her state of mind. This question was tried before the Judge Ordinary and a special jury in February, 1870, and they found that on the day the citation was served upon her (30th April, 1869) she was in such a state of mental disorder as to be totally unfit and unable to answer the petition, and to duly instruct her attorney for her defence, and that she has been ever since and still is unfit. (1) In consequence of the verdict, on the 8th of March, 1870, the Judge Ordinary made the following order:—"Upon hearing counsel for the petitioner and for Sir Thomas Moncrieffe, the guardian, ad litem, of the respondent, I do order that no further proceedings be taken in this suit until Lady Mordaunt recovers her mental capacity, and that the petitioner be at liberty to apply to the Court whenever he is able to affirm the respondent's recovery." The petitioner appealed to the full Court against this order; but on the 2nd of June, 1870, it was affirmed by the majority of the Court. (2) On that occasion the Judge Ordinary stated that if the form of the order created any difficulty in the way of the petitioner appealing to the House of Lords, and the dismissal of the petition would remove it, he was willing to hear any future application that the condition of the respondent or other considerations might warrant the petitioner in making with that object.

(1) See ante, p. 103. (2) See ante, p. 109.

Inderwick (*Ballantine, Serjt.*, with him), for the petitioner, on an affidavit from a medical man, Dr. Tuke, that there was no reasonable hope that the respondent would recover her soundness of mind, applied to the Court to dismiss the petition, the application to be without prejudice to the petitioner's right to appeal.

Dr. Deane, Q.C. (*Archibald* and *Searle* with him), for Sir Thomas Moncrieffe, neither assented nor objected to the application.

THE JUDGE ORDINARY. The order was drawn up in its present form for the purpose of giving the petitioner an opportunity of asserting his right to go on with his suit in case Lady Mordaunt should recover; the majority of the Court of appeal having come to the conclusion that he could not be allowed to do so, so long as she continues of unsound mind. If at the time the order was drawn up, it could have been assumed that she would never recover, it would not have been necessary to frame it in its present form. The petitioner is now desirous of resigning the liberty of continuing the suit which was reserved to him by the order, because he is satisfied she will never recover, and there is no reason why he should not be allowed to do so. The application is based upon an affidavit made by Dr. Tuke, from which it appears that there is no reasonable hope that Lady Mordaunt will ever recover her soundness of mind. The matter is one for the consideration of the petitioner, and if he is satisfied that his wife will never recover, he is at liberty to resign the right which had been reserved to him to continue the suit. The Court, therefore, will grant the application to dismiss the petition, but it is right that the House of Lords should know the ground on which the application is granted, and that it should be understood that the petitioner in making the application does not forego his right to appeal from this decree, or to bring under review the principles upon which the original decision staying the suit during the respondent's insanity was founded.

Attorney for petitioner: *B. Hunt.*

Attorneys for respondent: *Benbow & Saltwell.*

1872
March 19.

SHEPHEARD *v.* BEETHAM AND OTHERS.

Testamentary Suit—Citing Next of Kin—Subpœna to give Evidence as to State of Family—20 & 21 Vict. c. 77, s. 24.

An executor being desirous to propound, in solemn form, the last will of his testator, cited certain next of kin, but was unable to ascertain what other persons were entitled in distribution. The Court, under 20 & 21 Vict. c. 77, s. 24, ordered a subpœna to issue for the attendance of certain persons to be examined as to their knowledge of the members of the family, and the other next of kin of the deceased.

CORDELIA ANGELICA READ, of Stamford Street, Blackfriars, Surrey, spinster, died on the 6th of December, 1871, having executed a will dated the 16th of December, 1858, in which she nominated Charles Shepheard, the plaintiff, an executor. On the 15th of December, 1871, the plaintiff took out a citation calling upon Albert William Beetham, Julia Churchill, the wife of Robert Turner Churchill, and Sophia Mary Swift, the wife of Robert J. Swift, as first cousins and next of kin of the deceased, to see her will proved, and for the two former persons an appearance was entered thereto. On the 6th of February, 1872, the plaintiff took out another citation to see the proceedings, against Clelia Lucinda Cecilia Giorgi, and Laura Coppin, also first cousins and next of kin of the deceased. The plaintiff having reasons to believe that there were other next of kin of the deceased living, applied for information on the subject to the said Albert William Beetham and Julia Churchill, but their answers were unsatisfactory.

Searle moved the Court to issue a subpœna for the attendance of Albert William Beetham and Julia Churchill, to be examined touching their knowledge of the members of the family, and the other next of kin of the deceased. The 24th section of 20 & 21 Vict. c. 77, authorizes the Court to require the attendance of any person whom it may think fit to examine, or cause to be examined, in any suit or other proceeding in respect of matters or causes testamentary, and to examine them. These words are large enough to cover the present application.

Beetham, on behalf of Mr. Albert William Beetham and Mrs. Churchill, opposed the application.

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LORD PENZANCE thought the application reasonable, and that he had power to grant it. The plaintiff may, by his examination of the parties, obtain from them more information than they have at present given. He ought, however, to pay their costs of attendance as is usual with witnesses, and of their appearance that day to the motion.

Attorney for plaintiff: *A. J. Shepheard.*
Attorney for defendants: *R. B. Johnson.*

IN THE GOODS OF ELIZABETH GRAHAM.

May 19, 23.

Married Woman's Will—Inoperative—Probate.

A married woman had a power under her marriage settlement to dispose of certain property by will in case there were no children of the marriage, or they all died under age, or in the lifetime of her husband. She executed a will in which she recited the conditions of her power, and out of the trust funds gave an annuity to a particular individual, and the rest to her husband absolutely. She survived her husband and the annuitant, but did not re-execute her will. There were several children of the marriage, who attained their respective majorities, and survived their mother, so that the will was inoperative. The Court refused to grant administration with the will annexed to one of the children, as he had no interest under the will, but granted to him a general administration of the deceased's estate, upon filing an affidavit that she had left no will operative in law.

ELIZABETH GRAHAM, of Weybridge, Surrey, widow, died on the 31st of January, 1872, having executed a will dated the 6th of October, 1836, in which she did not appoint any executor. In this will the contents of an indenture of settlement, made on the 22nd of August, 1836, on the marriage of the deceased with the Rev. John Graham, were recited, and amongst other things that a sum of 11,300*l.* 3 per cent. consols, and a further sum of 2700*l.* 3½ per cent. reduced annuities, had been transferred by Elizabeth Moorsom, afterwards Elizabeth Graham, the deceased, to the trustees therein named, in trust, in the first instance, for the benefit of the children

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IN THE GOODS OF GRAHAM.

of the intended marriage, and in case the child, or all and every the children of the said intended marriage should die, as to a son or sons under the age of twenty-one years, or as to a daughter or daughters under such age, and without having been married, or in case there should not be any issue of the said intended marriage, or in case all the issue of the said intended marriage should fail and be extinct during the lifetime of the said John Graham, then in case the said Elizabeth Graham should not survive the said John Graham, in trust for such person or persons, such interest or interests, intents and purposes, and in such manner as the said Elizabeth Graham should notwithstanding coverture at any time, and from time to time, by any deed or writing, or by her last will and testament in writing, or any codicil or writing in the nature of or purporting to be her will duly executed, direct, and appoint. The will then continued :—"Now I, Elizabeth Graham, heretofore Elizabeth Moorsom, in exercise of the aforesaid power or authority, do by this my last will and testament direct and appoint that in case the child, or all and every the children of the said marriage, shall die under the circumstances hereinbefore in that behalf mentioned, or in case there should not be any issue of the said marriage, or in case all the issue of such marriage should fail or be extinct during the lifetime of the said John Graham, then such trust funds shall be in trust to pay to Mary Craig, of Whitby, widow of my late uncle Joseph Craig, during her life, one annuity or clear yearly sum of 50*l.* by equal half-yearly payments, the first thereof to be due and payable at the expiration of six months next after my decease; but subject to and chargeable with the said annuity, I direct and appoint that the whole of the said trust funds shall be for the absolute use and benefit of my husband John Graham." Both the annuitant and the husband died in the lifetime of the deceased, the latter having made a will in which he named his wife, Elizabeth Graham, sole executrix, who took probate thereof. There were four children of the marriage, all of whom attained their respective majorities, and who survived their mother, the deceased. An objection having been taken in the registry that as under the circumstances the will was entirely inoperative, probate ought not to be granted of it.

Moorsom moved that administration with the will annexed of

the deceased be granted to Arthur Robert Graham, one of the children. He submitted that the Court of Probate will only require proof that there is a power, and that the will is duly executed. The operation of the will is a question for another court. He referred to *Barnes* v. *Vincent* (1); *In the Goods of P. A. Cooper.* (2)

March 23. LORD PENZANCE. This case stood over that I might consider certain cases referred to by counsel. It was an application for administration with the will annexed of a married woman's will, and the object of the claimant was to pay a lower scale of duty than he would have to pay in the case of a general administration. The case of *Barnes* v. *Vincent* (1) was depended on, and it was urged upon the Court that on the authority of that case it ought to grant the application. The principles contained in *Barnes* v. *Vincent* (1) are found in the following sentence:—"The safest and most consistent course is to grant probate wheresoever the paper professes to be made and executed under a power, and is made by one whose capacity and testamentary intention are clear, and no other objection occurs save those connected with the power, for example, no objection on the provisions of the Wills Act; and leave the Court, which has to deal with the rights under that instrument, to decide whether or not it is authorized by that power and by its execution." These principles ought to be maintained. No question arises here as to the character, condition, or limits of the power, nor of its adequate execution. But assuming the validity of the power, and its due execution, the question still remains whether, according to the practice of this Court, administration ought to be granted to the applicant, who is one of the children of the deceased, with the will annexed. The deceased was a married woman, having a power under certain circumstances to make a will. The will in question recites the power, and other matters, and goes on in its operative part to give in certain events, namely, in case the children of the marriage should die under age, or in case there should not be any issue of the marriage, or all the issue of the marriage should fail or be extinct during the lifetime of her husband, John Graham, an annuity to Mary Craig, and subject to

(1) 5 Moo. P. C. 201. (2) Deane 9.

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that the whole of the trust funds to her husband, John Graham, absolutely. Both Mary Craig and John Graham died in the lifetime of the deceased. Now in the case of a married woman who, except under certain circumstances, is not competent to make a will at all, the practice of this court is to make a grant limited to such property as she had power to dispose of by will, and had by her will disposed of, and a separate grant of administration of all the rest of her personal estate, namely, all such as would pass in case of an intestacy. This limited grant of property passing under the will is always made either by way of probate to the executor, if any, or by way of administration with the will annexed. But in the present case the operation of the will, to begin with, is made to depend on an event which never happened, namely, the death or failure of children; and, secondly, the bequests contained in it are in favour of two people who both died before the death of the testatrix. There is, therefore, no one to whom, as interested under the will, administration with the will annexed can be granted. And if in making to the applicant such grant as he is entitled to, any notice should be taken of this will, it ought only to be by excepting all such personal estate as the testatrix had power by will to dispose of, and has by her will disposed of. In the events, however, which have happened, such an exception would be fruitless, and the proper grant to make will be a general administration, founded on an affidavit that the deceased left no will operative in law. If there is felt any difficulty in making such an affidavit, the grant of administration may go, with the exceptions above indicated.

Attorneys: *Norris, Allens, & Carter.*

BULLOCK *v.* BULLOCK AND STRONG.

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March 19.

Dissolution of Marriage—Deed of Separation—Allowance to the Wife—22 & 23 Vict. c. 61, s. 5.

By a post-nuptial settlement certain property belonging to the respondent was assigned to trustees in trust, amongst other things, to pay the interest and annual proceeds thereof to her for her separate use. Subsequently a deed of separation was entered into between the parties with the same trustees as those of the post-nuptial settlement. By this deed the petitioner covenanted to pay the respondent an annuity for her life.

A decree for dissolution of marriage having been obtained on the ground of the respondent's adultery, application was made to the Court to vary the deed of separation, so as to relieve the petitioner from the payment of the above-mentioned annuity. The Court ordered that whenever any money should be payable to the respondent under the deed of separation the trustees should, out of the moneys in their hands payable to the respondent under the post-nuptial settlement, pay and apply a sum equal in amount upon such and the same trusts as would be applicable thereto in case the respondent were dead and had died in the lifetime of the petitioner.

THIS was originally a suit for dissolution of marriage brought by Richard Bullock against his wife Sarah Bullock, by reason of her adultery with Joshua Strong. A decree nisi was made on the 25th of June, 1871, and a decree absolute on the 19th of December, 1871. On the 4th of January, 1872, the petitioner presented his petition under 22 & 23 Vict. c. 61, praying the Court to vary the conditions of a deed of separation entered into by him with his wife and George Parker and Charles Jones Humphreys as trustees, and dated the 14th of May, 1869. Neither the respondent nor the trustees appeared to or answered this petition. The parties were married on the 25th of June, 1850, and on the 2nd of August, 1861, a post-nuptial settlement was executed by which a reversionary interest in one-sixth part of 800*l.* and a legacy of 1000*l.*, to which property the respondent had become entitled, as also any other moneys or things which should be bequeathed to her were secured to her separate use. The petitioner did not desire any alteration to be made in this settlement. By the deed of separation he covenanted to pay to his wife, her executors, administrators, or assigns, an annuity of 25*l.* for life, in half-yearly payments to be made on the 14th of May and the 14th of November of every year, the first

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half-yearly payment to be made on the following 14th of November if Sarah Bullock were then alive, or a proportionate part thereof to her executors or administrators if she were dead. And he further covenanted that if at any time thereafter his annual income from any source should increase beyond his then annual income, then that he would during such time as his income was so increased, during the joint lives of himself and his wife Sarah Bullock, pay to her, her executors, administrators, or assigns, in addition to the annuity of 25*l.*, an annual sum equal in amount to one-sixth of such increase of his annual income, by equal half-yearly payments clear of all deductions, and that the first half-yearly payment of such additional annual sum or of a proportionate part from the date of the increase of his income should be payable on that one of the said half-yearly days which should first happen after such increase should have taken place, if Sarah Bullock were then alive, or a proportionate part thereof to her executors or administrators if she were then dead. There were further covenants in reference to their children, and to secure subsequently acquired property in right of the wife to her separate use, as under the post-nuptial settlement.

The registrar reported that now the marriage was dissolved the petitioner should be relieved from his covenant to pay to the respondent the annuity above mentioned.

Dr. Tristram moved the Court to vary the deed of separation by an order to relieve the petitioner from making any payments to the respondent in pursuance of the covenants on that behalf therein contained, and to alter such deed so far as it may be inconsistent with the trusts of the deed of settlement of the 2nd of August, 1861. [He referred to *Callwell* v. *Callwell and Kennedy* (1), *Stone* v. *Stone and Brownrigg* (2), *Worsley* v. *Worsley and Wignell.* (3)]

THE JUDGE ORDINARY. Nobody opposes the present application, and it seems to me to be reasonable. I will consider whether the order can be made, and if so, in what form.

The order subsequently made was to the following effect: The

(1) 3 Sw. & Tr. 259. (2) 3 Sw. & Tr. 372; 33 L. J. (P. M. & A.) 95.
(3) Law Rep. 1 P. & M. 648.

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Judge Ordinary, having read the petition filed on the 4th of January, 1872, and the report thereon of the registrar to whom the same had been referred, and statement, whereby it appeared that by an indenture of settlement dated the 2nd of August, 1861, and made between the Rev. Richard Bullock (the petitioner in this cause) and Sarah Bullock (the respondent in this cause) of the first part, and George Parker, the younger, and Charles Jones Humphreys, as trustees, of the other part, a certain reversionary share or interest to which the said respondent was or would have been entitled on the decease of Jane Partridge, in a certain legacy or sum of 800*l.* bequeathed by the will of Hannah Parker, was assigned to the said trustees upon trust to pay the interest and annual proceeds thereof to the said respondent for her life, for her sole and separate use without power of anticipation, and upon the further trusts therein mentioned. And that the said petitioner and the said respondent covenanted with the said trustees that if at any time during the joint lives of the said petitioner and respondent the said respondent or the said petitioner in her right should become beneficially interested in or entitled to any personal property, except as therein excepted, then the said petitioner and the said respondent should and would assign to the said trustees all such personal property to be held by the said trustees upon the same trusts as were applicable to the said reversionary shares or interest. And it also appeared that by a certain other indenture dated the 14th of May, 1869, and made between the same parties, the said petitioner covenanted with the said trustees that he, his heirs, executors, or administrators, would, during the life of the said respondent, pay unto her, her executors, administrators, or assigns, an annual or clear yearly sum of 25*l.* as therein mentioned, and that if at any time thereafter the annual income of the said petitioner from any source should be increased beyond his then existing annual income then he the said petitioner, his heirs, his executors, or administrators would during such time as such income should be so increased during the joint lives of himself and the said respondent, pay unto the said respondent, her executors, administrators, or assigns, in addition to the said annuity of 25*l.*, an annual sum equal in amount to one equal sixth part of such increase of his annual income. And having heard counsel thereon on behalf of the petitioner,

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ordered that from and after the date of this order, and so often as any sum of money should be payable by the said petitioner, his heirs, executors, or administrators, to the said respondent, her executors, administrators, or assigns, under or by virtue of the said secondly recited indenture of the 14th of May, 1869, the trustees for the time being of the said firstly recited indenture of settlement of the 2nd of August, 1861, should pay and apply out of the moneys payable to the said respondent under and by virtue of the said firstly recited indenture a sum equal in amount to the said sum of money so payable by the said petitioner, his heirs, executors, or administrators to the said respondent, her executors, administrators, or assigns under and by virtue of the said secondly recited indenture, upon such and the same trusts as would be applicable thereto in case the said respondent were dead and had died in the lifetime of the said petitioner.

Attorney for petitioner: *G. Badham.*

April 16, 23.

GODRICH *v.* GODRICH.

Suit for Dissolution—Cruelty—Adultery—Verdict on First Point only—Practice.

In a suit for dissolution of marriage, brought by the wife by reason of the cruelty and adultery of her husband, the jury found a verdict for the petitioner on the question of cruelty, but were unable to agree to a verdict on that of adultery, and were discharged. The Court refused to allow the question of adultery only to be referred to a new jury, but gave the petitioner the alternative, either to have a rule, calling upon the respondent to shew cause why a decree of judicial separation should not be made on the ground of his cruelty, or to set down all the questions at issue, both adultery and cruelty, for a second trial.

IN this case the wife petitioned for a dissolution of her marriage by reason of the adultery and cruelty of her husband, who denied both charges. The questions at issue were heard before the Judge Ordinary and a common jury, in March, 1872, and after consulting for some hours, the jury returned into Court and signified that they were unable to agree to a verdict on the question of adultery, but that as regards the cruelty they found for the petitioner. Thereupon they were discharged.

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R. E. Webster, for Mrs. Godrich, moved the Court to order a new trial on the question of adultery only.

No counsel appeared for the respondent.

April 23. THE JUDGE ORDINARY. In this case the Court took time to consider what order it should make, having regard to the circumstances that took place at the trial. The jury having retired to deliberate on their verdict, after an absence of some hours returned into court, and stated that they could not agree upon a verdict, but intimated that they had made up their minds on the first question, as to the cruelty, in favour of the petitioner; on the rest of the matter they were unable to agree. They were then discharged. The question is, what now is to be done? The petitioner applies to the Court to order a new trial on the issues of adultery only. The respondent does not appear. In the Common Law Courts such a verdict could not be accepted. The jury must agree or disagree upon the matters referred to them, they cannot return a verdict on a part of a case. Hitherto the same course has been adopted in this court, save in one or two instances where the jury have disagreed upon some subordinate matters upon which it was not necessary to have their decision at all. In those cases the verdicts were allowed to stand, notwithstanding such disagreement. The practice, therefore, is not different from that of the Common Law Courts. In the present case, if I were to grant a new trial as to the adultery, I should be making an order quite contrary to anything that has taken place here or elsewhere. It is not the practice to grant a new trial, under such circumstances, but to order the whole matter to be set down again for trial. The proper course to be pursued will be to allow the petitioner to serve a rule upon her husband to shew cause why the jury having been unable to agree upon the issue of adultery, their verdict as to cruelty should not be accepted, and the jury be discharged from giving any verdict on the adultery, and a decree of judicial separation made. If Mrs. Godrich accepts this offer, the rule nisi may issue; if she requires that the question of adultery shall be tried again, the whole matter must go before a new jury. The rule may include the question of costs of trial.

Attorney for petitioner: *A. Beddall.*
Attorney for respondent: *W. D. Smyth.*

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April 23, 30.

IN THE GOODS OF M. A. HARDING.

Administration—Deceased Married Woman—Husband Survivor—Chose in Action not reduced into Possession—Double Administration.

The deceased, being entitled to a legacy on the death of another person, married and died in the lifetime of her husband, who also died before the legacy had become payable, and without having taken out administration to his wife:—

Held, that the legacy formed part of the estate of the husband, and that administration to the deceased in respect of such legacy could only be granted to the representative of the husband.

MARY ANN HARDING, late of Smallwood, Cheshire, died on the 21st of May, 1850, intestate. By the will of her father, Edward Taylor, dated the 30th of March, 1844, certain property was given to his wife for her life, and, on her death, to his son Amos Taylor, his heirs and assigns, subject to a charge of 400*l.*, to be raised by mortgage, or sale, or otherwise, of such property. The said sum of 400*l.*, when so raised, was to be paid to his daughter Mary Ann Taylor (the present testatrix), her executors, administrators, or assigns absolutely. Edward Taylor died on the 3rd of March, 1847, and his will was proved by his executors in August, 1847. Mary Ann Taylor afterwards intermarred with Isaac Harding, who survived her, and died on the 4th of August, 1867, without having taken administration of his wife's effects. He died intestate, leaving an only child of the marriage, Amos Harding. Mrs. Taylor, the tenant for life under the will of Edward Taylor, died on the 14th of January, 1871.

Dr. Tristram moved the Court to decree administration of the estate of Mrs. Harding to her son Amos Harding, without requiring him in the first instance to take out administration to his father. The legacy was a chose in action, which did not vest in the husband by the mere operation of the marriage, nor was it afterwards reduced into possession by him. He referred to Williams' Executors, pt. 2, bk. 3, ch. 1, sec. 3; *Betts* v. *Kimpton* (1); *Fielder and Fielder* v. *Hanger* (2); *In the Goods of M. Pountney* (3); *In the Goods of Jane Elizabeth Crause.* (4)

(1) 2 B. & Ad. 273.
(2) 3 Hagg. Eccl. 769.
(3) 4 Hagg. Eccl. 289.
(4) 1 Sw. & Tr. 146.

April 30. LORD PENZANCE. This case stood over in order that I might consider the argument addressed to me by counsel on the question whether or no a double administration is necessary. The deceased died intestate in May, 1850. Her husband survived her, and he died in 1867, without having administered to his wife. At the time of her death Mrs. Harding was entitled to a legacy of 400*l.*, payable on the death of a Mrs. Taylor, who died in 1871. The motion was for a grant of administration of the goods of the deceased to Amos Harding, her son. To this it was answered that the property of a wife, who dies first, passes to her husband. In reply, it was said, that this was a chose in action not reduced into possession, and therefore did not pass to the husband. Whatever be the nature of her personal estate, if the wife dies first, it belongs to the husband. If she survives him, her choses in action belong to her or her next of kin, and she may dispose of them by will, unless the husband by force of his marital rights has reduced them into possession in his lifetime. There is no such principle of law where the husband survives her. In *Partington* v. *Attorney-General* (1) the question arose on the devolution of property under similar circumstances as these according to foreign law. No doubt was expressed in that case that according to the law of this country it would pass to the husband. The applicant must take out administration to his father in the first instance.

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IN THE GOODS OF HARDING.

Attorneys: *Hicklin & Washington.*

IN THE GOODS OF W. WAKEHAM.

May 7.

Will—Executrix for Property not named in Will.

A testator by his will gave several specific legacies, but did not dispose of the residue of his personal estate. He appointed his daughter executrix for all property, wheresoever and whatsoever, not named in his will, and two other persons to be joint trustees. The Court refused to grant probate of the will to the daughter as executrix thereof.

WILLIAM WAKEHAM, of Torquay, Devonshire, builder, died on the 14th of December, 1871, having executed a will dated the

(1) Law Rep. 4 H. L. 100.

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27th of August, 1866. By this will he gave certain houses and his household furniture to his wife, Susannah Wakeham, for life, and to his daughter, Sarah Ann Pillar Wakeham, other houses and a silver cup, and, after the death of his wife, the whole of the property that he had bequeathed to Mrs. Wakeham, for her natural life for her sole use and benefit and without waste. He then disposed of this property in the event of his daughter dying with or without children. The will concluded as follows: "I constitute, nominate, and appoint that my daughter hereinbefore named to be my executrix for all property, wheresoever and whatsoever, not named in the aforesaid will, and also that John Bradridge, of Tor, builder, and Edward Simmons, of Torquay, grocer, be joint trustees of this my will." The residue was undisposed of, and testator left surviving him his widow and daughter, the only persons entitled to such undisposed of residue. The personal property was of the value of 4000*l.*, and there was no real estate.

Dr. Tristram moved the Court to grant probate of the will to Miss Wakeham as the executrix thereof.

LORD PENZANCE. The question is, whether this lady is executrix of the will. The testator distinctly says that she is to be executrix of all property not named in the will, he having left his residue undisposed of. This Court cannot grant probate to an executor, who is precluded from dealing with the property which passes under the will.

Dr. Tristram. The testator indirectly disposes of his residue by leaving it to be distributed under the statute.

LORD PENZANCE. The daughter is entitled to a share of the undisposed of residue. If her mother will file a renunciation, administration with the will annexed may be granted to her.

Proctors: *Brooks & Co.*

COTTRELL *v.* COTTRELL. 1872 *April* 20.

Two Wills—Revocation—Appointment of Executor revoked without express Words of Revocation—Costs.

A testator by his first will, executed in England according to English law, disposed of all his realty and personalty and appointed an executor. By his second and last will, executed in Italy, where he was domiciled at the time of his death, according to the law of Italy, he appointed his wife his universal heiress, and the will contained a revocatory clause in the following terms: "I erase, revoke, and annul every other act or last will which I may have made."

The Court held that the Italian will revoked the disposition of the personalty and the appointment of executor contained in the English will, and that the Italian will alone was entitled to probate. The executor of the English will, who propounded it as entitled to probate with the Italian will, was condemned in costs.

THE testator, Henry Count Cottrell, was an Englishman by birth, but he had lived for many years in Italy and had acquired an Italian domicile, and he died at Nervi, in Italy, on the 15th of March, 1871. He left two wills: the first executed in England, according to the form prescribed by the law of England, on the 8th of April, 1850; the second, executed in Italy, according to the form prescribed by the Italian law, on the 20th of December, 1865. The English will disposed of all his property, real and personal, and appointed his brother, the defendant, executor; the Italian will appointed his wife, the plaintiff, his universal heiress, and contained a general revocatory clause. On the 7th of April, 1871, the defendant proved the English will in common form, and the plaintiff afterwards called in that probate and instituted this suit for the purpose of having it revoked. The question raised by the pleadings was whether the Italian will revoked the appointment of the defendant as executor contained in the English will. The cause came on for hearing before the Court without a jury.

The clauses of the Italian will on which the question turned were as follows: "I erase, revoke, and annul every other act or last will which I may have made, willing that this my present will shall receive all its efficacy and execution." After making certain bequests, the will continued: "In respect of all my other goods, real or personal rights and shares, and of all and whatsoever I may find myself having, enjoying, and possessing at the day of my

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demise, in whatever locality placed and situate, as my universal heiress I nominate and will to be the Countess Sophia Augusta Cottrell, my well-beloved consort; and in event of this my consort dying before coming into my estate, then I nominate as my universal heirs, my sons and daughters as my heirs in equal portion one with the other, without distinction of sex; and in the event of no legitimate children of mine and of my above-named consort being in existence at the time of my decease, then I institute and nominate as my heirs my beloved brother George Edward Cottrell and my beloved sister-in-law Caroline Augusta Ley, the wife of James Peard Ley and widow of John Gordon, sister of my well-beloved consort, and in their default their heirs in equal portion between the two."

Two advocates had been examined at Florence under a commission, who proved that by the law of Italy the Italian will was valid, that it appointed the plaintiff universal heiress, and that the revocatory clause contained in it operated as a revocation of all previous wills, including the appointment of executors.

Dr. Spinks, Q.C., and *Bayford*, for the plaintiff, argued that the Italian will revoked the appointment of executor contained in the first will, by the English law as well as by the Italian law, and cited *Henfrey* v. *Henfrey* (1), *Laneuville* v. *Anderson.* (2)

Dr. Deane, Q.C., and *Pritchard*, for the defendant. Both wills are entitled to probate, because the second will does not revoke the appointment of executor contained in the first will. *In the Goods of Jordan* (3); *In the Goods of Leese* (4); *Geaves* v. *Price.* (5) The term universal heir is not co-extensive with executor: *Anderson* v. *Poilblank.* (6) The devise of realty in the English will is not revoked by the Italian will.

LORD PENZANCE. The right to prove the first will is based on the law of England, and the argument is that if there be a will which disposes of personalty and realty, and nominates an executor, and there be a subsequent will disposing only of personalty, and not affecting the realty, the first will is entitled to probate as well

(1) 4 Moo. P. C. 29.
(2) 2 Sw. & Tr. 24.
(3) Law Rep. 1 P. & M. 555.
(4) 2 Sw. & Tr. 442.
(5) 3 Sw. & Tr. 71.
(6) 3 Atk. 299.

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as the second, because there is no revocation in the second of the devise of realty, and of the nomination of executors. A case was cited in support of the proposition that the language used by the testator in the second will did not revoke the appointment of executors. I propose to deal first with the question whether, assuming that the English law is to be applied to the case, the facts are such as to bring it within the proposition that the first will is not revoked by the second.

The second will disposes of all the personalty of the testator. After making certain bequests, it proceeds thus: "In respect of all my other goods, real or personal, rights, and shares, and of all and whatsoever I may find myself having, enjoying, and possessing at the day of my demise, in whatever locality or place situate, as my universal heiress I nominate and will to be the Countess Sophia Augusta Cottrell, my well-beloved consort."

This clause is in the disposing part of the will, and it is obvious enough that the testator's intention was to make his wife residuary legatee, or in the language used in foreign countries, his universal heiress. There is no technical rule as to the words necessary to operate as a revocation; the question is simply one of intention. Bearing in mind that it was clearly the testator's intention to make his wife his universal heiress, I pass to the words of revocation. "I erase, revoke, and annul every other acts or last will which I may have made, willing that this my present will shall receive all its efficacy and execution." It seems to me that, giving a legitimate meaning to these words, they entirely revoke the preceding will. It is a question of intention, and how can it be supposed that the testator, having made his wife his universal heiress, and having "erased, revoked, and annulled" every other act or last will which he may have made, intended to keep alive the nomination of executor contained in a former will, the provisions of that former will being revoked, except as to the realty, with which an executor has nothing to do. Treating it as a question of intention, to be gathered from the construction of the last will, I am of opinion that it revoked the appointment of executor in the preceding will.

There is another view of the case based upon the Italian law. The evidence before the Court proves that, according to the law

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of Italy, the revocatory clause in the last will would carry with it the revocation of the previous appointment of executors. The advocate Siccoli deposes that a general revocatory clause in a posterior will annuls an anterior will. "The revocatory clause in the will of the 20th of December, 1865, is sufficient to revoke the will of April, 1850, and this revocation would extend to the appointment of executors in the previous will."

The appointment of executor in the English will having been revoked by the Italian will, both according to English law and according to Italian law the Court revokes the probate of the English will which has been granted to the executor.

Dr. Spinks. The defendant should be condemned in costs, for he ought not to have taken probate when he knew that there was a later will.

Dr. Deane. It is a case of first impression, and the executor had a right to take the opinion of the Court upon it.

LORD PENZANCE. I do not think the defendant was to blame for taking probate in the first instance, but I cannot help asking myself what need was there for all this litigation? A commission has been sent to Italy, skilled witnesses have been examined, and a great deal of expense has been incurred, the only question being whether the executor appointed by the first will could insist upon his right to act as executor, after the will itself had been substantially revoked, and all the duties of an executor had been withdrawn from him by the different disposition of the property. In substance, the will is merely a will of realty, and does not require to be proved in this court. He could have no object in proving the will, even if, on technical grounds, he had been entitled to do so, for he had no interest as executor to guard or maintain, and the litigation which he has provoked seems to me wholly unnecessary. As he had no bonâ fide motive that I can discover, and he has failed on the question of law which he has raised, he must be condemned in costs.

Solicitor for plaintiff: *William Ley.*

Solicitors for defendant: *G. S. & H. Brandon.*

GILES AND CLARK *v.* WARREN AND OTHERS.

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May 23.

Will—Revocation by tearing—Intention.

A testator, under the false impression that his will was invalid, tore it up. Immediately afterwards, on reconsideration, he collected the pieces, and placed them together amongst his papers of importance, and preserved them until his death :—

Held, that as the act done was not accompanied by an intention to revoke a valid will, it was ineffectual, and the will was admitted to probate.

DANIEL GILES, of West Street, London Fields, Hackney, Middlesex, died on the 16th of July, 1871, having made a will bearing date the 24th of November, 1866, in which he appointed his wife Susan Giles, George Clark, and William Grimwood King, executors and trustees. By this will he ordered certain freehold houses and land belonging to him to be sold, and out of the proceeds of the sale several legacies to be paid, and the residue of his real and personal estate he left to his wife absolutely. The plaintiffs, as two of the executors named therein, propounded this will, and the defendant, Rebecca Warren, one of the next of kin of the deceased, pleaded that it was not executed according to the provisions of the statute 1 Vict. c. 26; and that after the making of the alleged will the said Daniel Giles revoked the same by tearing it, with an intention to revoke the said will. Issue was joined on these pleas, and on the 3rd of April, 1872, it was ordered that the cause should be tried on oral evidence before the Court itself. At the hearing the due execution of the will was proved, and Mrs. Giles, the plaintiff and the widow of the deceased, deposed that after the execution of the will her husband placed it in a box where he kept his deeds and papers. In the summer of 1867 she accompanied her husband to Yarmouth, where they made the acquaintance of a Mr. Hillstead. After their return home Mr. Hillstead called upon them in West Street. In the course of conversation, reference having been made to his will, her husband said to Mr. Hillstead, "I will get it out and shew it to you." He did so. Mr. Hillstead read it, and said it was not legal. Mr. Giles asked, "Why not?" Mr. Hillstead said, "Because the items are not named in it—the particulars of the money in the bank." Mr. Giles took the will, and said to the deponent, "Well then, child, it

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is of no use." He had the paper in his hand. He tore it at the moment he spoke to her. He then gave to deponent the bits and said, "Lay them on the fire." There was no fire lighted. She laid them on the grate and then went into the garden. Shortly afterwards Mr. Giles followed her into the garden and called out, "I have bethought myself, George don't know everything. I have taken them away." He had the pieces of the will in his hand. He further said, "I will put them away; they will be of use to you at some future time." Mr. Giles then put the pieces in a book, and placed it in the box with his other papers.

Mr. Hillstead was also examined, and deposed as to his visit to Hackney, in August, 1867, and to the reading of the will. He told the testator that he had better have inserted the particulars of his property in the will, but he did not say that without such particulars the will was invalid. It was very likely the testator thought from what deponent said that the will was not legal. Declarations of the testator of his intentions in tearing the will, made subsequently to the date of this transaction, were offered, but rejected by the Court.

Dr. Deane, Q.C., and *Inderwick*, appeared for the plaintiffs, and contended that as the act was done under a misapprehension it was not a final act, and there was no revocation. They referred to *In the Goods of F. B. Colberg* (1); *Elms* v. *Elms* (2); *Clarkson* v. *Clarkson and Others.* (3)

Dr. Spinks, Q.C., and *Bayford*, appeared for the defendants, but did not offer any opposition.

LORD PENZANCE. I think in this case there was no revocation. The fact that a testator tears or destroys his will is not itself sufficient to revoke one properly executed. That is to say, the bare fact. If, for instance, he tears it imagining it to be some other document, there would be no revocation, for there would be no animus revocandi. He must intend by the act to revoke something that he had previously done. There can be no intention to revoke a will, if a person destroys the paper under the idea, whether right or wrong, that it is not a valid will. Revocation is

(1) 2 Curt. 832. (2) 1 Sw. & Tr. 155. (3) 2 Sw. & Tr. 497.

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a term applicable to the case of a person cancelling or destroying a document which he had before legally made. He does not revoke it if he does not treat it as being valid at the time when he sets about to destroy it. According to the evidence the testator, in consequence of some conversation he had with Hillstead, was under the impression that he had made no valid will, and, as being useless, he tore the document up and threw it on the fire. That is no revocation. What happened afterwards was not material. If the will had been once revoked, the testator could not set it up again by subsequent declarations.

Attorney for plaintiffs: *A. Crossfield.*
Attorney for defendants: *J. Terry.*

IN THE GOODS OF E. H. TURNER.

May 28.

Will and Codicil—Will destroyed—Codicil not revoked—1 *Vict. c.* 26, *s.* 20.

The deceased executed a will and codicil. In the latter she referred in several paragraphs to the dispositions contained in her will, and more particularly she bequeathed a certain legacy to be held under conditions stated in her will. She subsequently destroyed the will by burning it, but preserved the codicil:—

Held, that as the codicil was not revoked by any of the methods prescribed by the Wills Act, it must be admitted to probate.

ELIZA HUDDART TURNER, of Tandridge, Surrey, spinster, died on the 19th of April, 1872. On the 8th of June, 1858, she duly executed a will, in which she appointed William Cotton and Charles Hampden Turner to be her executors; and on the 27th of July, 1864, a codicil to the following effect: "This is a codicil to the will of me, Eliza Huddart Turner, formerly of, &c., which will bears date the 8th day of June, 1858. In consequence of the heavy affliction with which God has seen fit to visit my dear nephew, Charles Hampden Turner, I hereby revoke and cancel all the parts of my said will which relate to him; and I hereby give and bequeath to my nephew, Francis Matthew Hampden Turner, the six thousand pounds which I had bequeathed to his brother, C. H. Turner, to be held by the said Francis Matthew Hampden

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Turner under the conditions stated in my said will, and in addition to the six thousand pounds bequeathed to him absolutely in the said will. And I hereby give and bequeath the residue of my real and personal property whatsoever and wheresoever to my nieces, &c., to be divided between them in such manner as they shall decide. I hereby recal the appointment of my friend, William Cotton, Esq., of Walwood House, as my executor, and appoint his son, Henry Cotton, Esq., my sole executor. And in all other respects I confirm my said will." On the death of the deceased this codicil was found in an envelope endorsed "Dated 8th June, 1858. Will of Miss Turner. Executors, Henry Cotton, Esq." (in the handwriting of deceased), "Chas. H. Turner, Wm. Cotton" (these two last names were struck out with a pen). In a corner were the words "Codicil dated July 27th, 1864." No will was found in the envelope, which had been originally sealed and afterwards re-opened. The will had been burnt by the deceased, with an intention to revoke it, and certain memoranda were left by her in accordance with which she desired her property to be distributed.

Dr. Deane, Q.C., on the part of Mr. Cotton, the executor named in the codicil, and also on behalf of the next of kin, applied to the Court to direct what papers, if any, should be admitted to probate. He submitted that the codicil was so worded that it could have no operation independently of the will. He referred to *Barrow* v. *Barrow and Others* (1); *Hale* v. *Tokelove* (2); *Rogers* v. *Goodenough and Others* (3); *In the Goods of W. Greig* (4); *Black* v. *Jobling*. (5)

LORD PENZANCE. This question has arisen several times lately. It is, whether, when a will has been revoked, a paper which is called a codicil perishes with it? Before the statute there is no doubt that if the will were destroyed, primâ facie the codicil fell with it; and in some cases that have been decided since the statute a similar principle has been upheld, provided that if the Court thought that the testator intended that the codicil should

(1) 2 Phillim. t. Lee, 335.
(2) 2 Robert. 318.
(3) 2 Sw. & Tr. 342.
(4) Law Rep. 1 P. & M. 72.
(5) Law Rep. 1 P. & M. 685.

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have an operation independent of the will, it would admit it to probate, although the will had been destroyed. I have tried in vain to get a clear idea of what was meant by a codicil being dependent or independent of the will; and in *Black* v. *Jobling* (1) I endeavoured to shew the difficulty I had had to find any safe rule on which I could act. "In one sense any codicil that makes any disposition of property at all must be considered to be dependent on the will, which disposes of the rest; for the codicil conveys only a part of the testator's intention regarding his property, and the motives inducing that particular part of his intention cannot, with any certainty, be dissevered from the motives which induced the disposition of the rest. It is difficult, if not impossible, to predicate of a particular bequest in a codicil, that the testator would have made it if he had disposed of his other property in any different manner than that expressed by his will. It may be that the "independence of the will" spoken of is something of a more limited character; and the meaning of the cases may be that a codicil is independent of a will, unless it be of such a character that the giving validity and effect to it without the will to which it was intended to be attached would produce some manifest absurdity. I am not sure that even this rule is capable of being easily applied to all the cases that might arise, and I have serious doubts whether such a rule is to be gathered from the cases with sufficient distinctness to justify the Court in adopting it." I went on to state that it seemed to me that the statute had settled the matter, and that it is no longer competent for this Court to hold that a properly executed testamentary paper can be revoked in any other manner than by the methods stated therein. The words of the statute are decisive; and if on some speculation as to the testator's intention or supposed intention in reference to a connection between the will and codicil, I were to hold that the codicil is revoked by some method not in accordance with the statute, I should be acting directly contrary to its provisions. It is true there have been decisions since the statute to a contrary effect, but there is some confusion in the opinions of the learned judges, as reported. Sir H. J. Fust is supposed to have stated in one case that the only difference made by the statute was that it

(1) Law Rep. 1 P. & M. 685.

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required that an "intention to destroy must be shewn;" whilst Sir C. Cresswell stated that Sir H. Fust had decided that the statute made no difference at all. I must hold that the words of the statute are imperative. But it is said there is a difficulty in this case, because, by reason of the will having been destroyed, the codicil in great part is unintelligible. It seems to me that that difficulty has no bearing upon the question whether this codicil shall be admitted to probate. The same difficulty applies in every case where some other document is mentioned in a will, in such manner that the directions of the will cannot be carried out without a reference to such document, and that document is not forthcoming. It is a question of construction, which another Court only can decide. I am clear the codicil must be admitted to probate. The will having been destroyed, it is the only testamentary paper so admissible.

Proctor: *Toller.*

June 11.

IN THE GOODS OF DURANCE.

Will—Codicil—Directions to destroy Will—Revocation.

The testator, in a letter addressed to his brother, which was signed by him in the presence of two witnesses, directed his brother to obtain his will and burn it without reading it:—

Held, that the letter was a writing duly executed declaring an intention to revoke the will, and administration with the letter only annexed was granted to the next of kin of the deceased.

THOMAS JOHN DURANCE, Orchard Lane, Lincolnshire, gentleman, died on the 13th of September, 1871, at the General Hospital, Toronto, Canada, leaving his brother Joseph Durance, one of his next of kin. On the 14th of March, 1871, he executed a will, in which he named Thomas Joseph Plant sole executor. By this will he gave legacies of 100*l.* each to his brother Joseph Durance, and to his sister Harriett Elizabeth Durance, and 250*l.* to Thomas Joseph Plant. He charged these legacies on his real estate, and subject to them he devised his real estate and the residue of his personal estate to Annie Swallow absolutely. After the date of the will he went to Canada with the intention of permanently

residing there. On the 13th of September, 1871, he wrote two papers, which he sent to his brother Joseph Durance in England. The first was as follows:—

"I, Thomas John Durance, authorize Mr. Denman, of the firm of Messrs. Mee, Denman, & Co., solicitors, of Retford, in the county of Nottingham, to deliver up in full to my brother Mr. Joseph Durance, of No. 9, the Park, in the city of Lincoln, England, the will completed by me at his residence on Tuesday evening, the 14th of March last, together with the copy of the will of my late grandfather, Mr. Joseph Durance, Senior.

"Thos. John Durance.

"Witnesses to the signature of Thomas John Durance,
"John Greenshields,
"John Herbert."

The second paper was:—

"My dear Joe,—Enclosed, I hand you an order to get my will from Mr. Denman, which please burn as soon as you receive it without reading it. I will leave you my share as a deed of gift, leaving it to your honour to pay out of it 100*l.* each to each of my two sisters, and 100*l.* to Thomas Plant. I am very ill, so good bye. God bless you.

"Your affectionate brother,
"Thos. J. Durance.

"Witnesses,
"John Greenshields,
"Frank Booth."

This paper was executed in accordance with the requirements of the law of the province of Ontario, Canada, in which Toronto is situate.

Inderwick moved the Court to grant probate of the will, and also the letter to the executor named in the will.

LORD PENZANCE. The question is, whether the will is not revoked by the letter. If a man writes to another "Go and get my will and burn it," he shews a strong intention to revoke his will. In the language of the 20th section of the Wills Act (1 Vict. c. 26), the letter is a writing declaring an intention to

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revoke the will, and it is duly executed. It is also of a testamentary character, and therefore I shall grant administration with it annexed to Joseph Durance the brother and one of the next of kin.

Attorneys: *Swann & Co.*

June 18.

IN THE GOODS OF G. TOWGOOD.

Will and Codicil—Probate—Alteration after it has issued.

The Court allowed a probate to be amended after it had issued by the addition of a fuller description of the testator than therein contained in the first instance.

GEORGE TOWGOOD, late of Highgate, and of 33, Throgmorton Street, in the city of London, stockbroker, died on the 25th of April, 1872, having duly executed a will and codicil dated respectively the 10th of May, 1871, and the 6th of October, 1871, in which he appointed Frank Rowley Parker and John James Towgood, executors. Probate issued to the executors in due course, but both in the will, in the oath of the executors, and in the grant of probate, the testator was described as of Highgate, in the county of Middlesex only, whereas his full, true, and correct description is of Highgate, in the county of Middlesex, and of 33, Throgmorton Street, in the city of London, stockbroker. The testator had invested his property in various stocks and shares, amounting on the whole to fifty-one, and in most of these investments he is described as of Throgmorton Street. Unless the probate could be amended, it will be necessary in each case to make a statutable declaration of identity, and so considerable expense would be occasioned to the estate.

Bayford, for the executors, applied to the Court to allow the probate to be amended by the addition of the words "and of 33, Throgmorton Street, in the city of London," to the description of the deceased.

LORD PENZANCE. The practice is against the application, never-

theless, I think it is a very reasonable one. It would be very wrong to allow anything to be omitted that had been before introduced, as that might lead to complications; but I am not asked to interfere with the present description, only to add to it, and that, I think, may be done.

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Attorneys: *Sharpe, Parkers, Pritchard, & Sharpe.*

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Feb. 28.

Evidence of Cruelty—Surprise—New Trial as to some Charges of Cruelty, not as to all—Practice.

A wife having charged her husband with cruelty by the communication of disease, and also by personal violence, the Court found, on the evidence, that the charge of communication of disease was not proved, and that the charge of personal violence was proved. On the application of the husband, a rule for the rehearing of the issue which had been found against him was made absolute, on the ground of surprise; but the rehearing was ordered to be confined to the charge of personal violence, and not to extend to the charge of infection.

These were cross petitions in which the same issues were raised. The husband's petition was for restitution of conjugal rights, and the wife by her answer alleged adultery and cruelty. The wife's petition was for dissolution of marriage on the grounds of adultery and cruelty, and the husband's answer traversed those allegations. The two suits were heard together before the Judge Ordinary without a jury on the 29th of November, 1871. The cruelty charged by the wife consisted of divers acts of personal violence, and also of the communication of venereal disease, and the charge of adultery rested on the same evidence as the charge of cruelty by infection. Several medical witnesses were examined upon that issue.

In the result the Court came to the conclusion that the charge of infection was not proved, and therefore found the issues of cruelty by infection, and of adultery, in favour of the husband. But the issue of cruelty by personal violence was found in favour of the wife.

A rule nisi for a new trial of the issue of cruelty found against

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the husband was afterwards granted on his application, and that rule after argument was made absolute on the ground of surprise. The question was then raised whether the charge of cruelty by infection as well as the charge of personal violence was to be reheard. On the application of the wife the rehearing was ordered to be before a common jury.

Dr. Spinks, Q.C., and *Inderwick*, were for the wife.
D. Seymour, Q.C., and *G. Browne*, for the husband.

Feb. 28. THE JUDGE ORDINARY. In this case an application was made for a rehearing on the ground of surprise, and the Court having intimated that the application would be granted, a question arose whether the wife, who was the petitioner in one suit and the respondent in the cross suit, was or was not entitled to have the charge of the communication of venereal disease, which she brought against her husband, included in the questions to be submitted to the jury on the rehearing. The husband contended that this question ought not to be included in the new inquiry, because it was satisfactorily disposed of by the Court on the last inquiry, and that he would be put to considerable expense in producing a great deal of medical and other testimony if the question were to be tried a second time. The same issues were raised in the cross suits, the wife alleging that the husband had treated her with personal violence on four or five occasions which she specified, and further alleging the communication of venereal disease, making a charge of adultery founded on the same allegation. In granting a rehearing, the Court was mainly influenced by the fact that some evidence was given by the wife in support of one of the charges of personal violence which the husband had no reason to expect. She vouched a particular person as having been present when the act was committed, and the husband having no cause to suppose that he would be vouched, he was not in attendance. That person has now made an affidavit stating that he was present on the occasion referred to, but that nothing of the kind stated by the wife occurred. The Court thought this was a fair ground of surprise on which a new trial should be granted, but it is obvious that this being the ground of the new

trial it does not extend to the re-opening of the question whether or not venereal disease was communicated to the wife. Under all the circumstances, I think it would be unfair to the husband to put him to the cost of a second inquiry into that question. The Court therefore proposes so to frame the issue for the jury as to confine it to the question whether the husband was guilty of cruelty by personal violence.

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The husband must of course pay the costs of the first suit before the second trial.

Attorneys for wife: *Aldridge & Co.*
Attorneys for husband: *Paterson & Co.*

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June 4.

Judicial Separation—Permanent Alimony—Petition after Decree made—Practice.

The Court for Divorce, acting upon the principles and rules in operation formerly in the Ecclesiastical Courts, will allow a petition for permanent alimony to be filed after it has made a final decree for judicial separation.

THIS was originally a suit for dissolution of marriage, brought by Rosa Elizabeth Covell against her husband Alfred Covell, by reason of his adultery and cruelty. The respondent denied the charges, and the matter came on before the Judge Ordinary on the 2nd of February, 1872, when he decreed a judicial separation between the parties by reason of the adultery of the respondent, and that the children of the marriage should remain in the custody of the petitioner until further order. On the 6th of May, 1872, the petitioner presented a petition for permanent alimony; no application having been made by her for alimony pending suit. In this petition she alleged that the respondent is entitled to a moiety of four freehold houses, which produce to him a rental of 55*l.* per annum, and to 7000*l.*, and that he is carrying on the business of a butcher in America. On the 11th of May, 1872, an order was made for substituted service of the petition for alimony on William Saxby Covell, brother of the respondent; this service

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was effected on the 16th of May, 1872, and on the 23rd of May an appearance was entered on behalf of the respondent under protest. On the 30th of May notice was given to the respondent that on the 4th of June the petitioner would move the Court to decree to her such sum or sums of money, by way of permanent alimony, as to the Court may seem meet.

June 4. *G. Browne*, for the respondent, objected to the motion being heard. No petition for alimony was presented during the pendency of the cause. By the final decree the parties are discharged from the suit, whether in a suit of dissolution of marriage or judicial separation. Applications can only be made after the final decree when authorized specially by the statute, as in the cases of the custody of children, and the alteration of settlements. [He referred to *Vicars* v. *Vicars* (1); *Winstone* v. *Winstone and Dyne.* (2)]

Dr. Tristram, for the petitioner. This is a matter which is governed by 20 & 21 Vict. c. 85, s. 22, which authorizes the Court to act upon the principles and rules of the Ecclesiastical Courts in proceedings other than those to dissolve a marriage. There is no doubt that in suits for divorce à mensâ et thoro applications for permanent alimony were made after the final decree. The cases referred to on the other side were in suits for dissolution of marriage. [He cited *Westmeath* v. *Westmeath.* (3)]

Cur. adv. vult.

June 18. THE JUDGE ORDINARY. This case stood over that I might consider the point raised. It was a suit instituted by the wife against her husband for a dissolution of marriage, but in which the wife obtained a decree for judicial separation. Pending the suit, no order was made as to alimony, neither was any application on that subject made at the time the decree was pronounced. Since then the wife has filed a petition, in which she alleges that her husband has certain sources of income, and prays for permanent alimony. The husband has not answered this petition, but has appeared under protest, on the ground that the Court has no

(1) 29 L. J. (P. M. & A.) 20. (2) 2 Sw. & Tr. 246; 30 L. J. (P. M. & A.) 109.
(3) 3 Knapp. 42.

power to allot permanent alimony after it has made its final decree of judicial separation. The Court asked for some authority for this proposition, and it was referred to some passages in Burn's Ecclesiastical Law (Marriage), vol. i. p. 508 c. But they merely say that permanent alimony is payable to the wife when she has proved herself entitled to it, and make no distinction as to the times when the Court can exercise its powers. It was also contended that I am not in a position to admit this petition, by analogy from the wording of the 32nd section (20 & 21 Vict. c. 85), by which similar powers are given to this Court. The words of that section are, that the Court may, on any such decree, order the husband to secure to the wife a gross or annual sum of money by way of permanent alimony. It seems to me that the argument to be drawn from the words of the statute is applicable only to the subject-matter of that section, namely, cases of dissolution of marriage. No question arises there as to permanent alimony on a decree for judicial separation. The rule which will guide the Court in this matter will be that acted upon in the Ecclesiastical Courts in cases of divorce à mensâ et thoro. The question then is, was there any distinction maintained in those Courts such as the one contended for? I find no trace of any such in any report or book of practice, and having conferred with the registrars, I find they are also ignorant of any rule in those courts, which would render an application for alimony after sentence inadmissible. In *Cooke* v. *Cooke* (1) a sentence of divorce à mensâ et thoro was decreed in November, 1811, and in March, 1812, an application was made for permanent alimony; there had been no application for alimony pending suit. An appeal was prosecuted to the Arches Court against the amount of alimony allotted, but no objection was made to the time at which the alimony was allotted. Sir J. Nicholl said, "This was a suit by reason of adultery, the wife succeeded in that suit, the judge pronounced the libel proved, and decreed a separation; that sentence has been acquiesced in; the delinquency, therefore, of the husband has been established and is admitted. The Court below then proceeded to allot permanent alimony to the wife; no alimony during the suit had been applied for, but as the wife had a separate income it was understood that an applica-

(1) 2 Phillim. 40.

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tion for any further allowance during the suit, as alimony, would be resisted; and she remained content with her separate allowance. I consider this as tantamount to alimony during suit." The bearing of this last remark I do not quite understand; but the judgment satisfies me that the Ecclesiastical Courts entertained applications for permanent alimony after a decree for divorce had been made. On the whole, I see no reason why I should not receive this petition and decree alimony upon it. The Court is obviously not functus officio after the decree, for it has power to increase or diminish the alimony allotted at any time when it can be shewn that the husband's means have altered. If so, why may it not also award alimony for the first time after the decree? The husband must file an answer to the petition.

Attorneys for petitioner: *Mead & Daubeny.*
Attorneys for respondent: *Kingsford & Dorman.*

March 2.

M. (FALSELY CALLED C.) *v.* C.

Suit for Nullity—Failure of Proof—Effect of Delay—Costs.

P. D. 405. 410

A wife married in 1863, cohabited with her husband until 1870, and in 1871 instituted a suit for nullity by reason of his impotency. Having failed to establish the charge, her suit was dismissed, and as she had separate property she was condemned in costs.

Relief in suits of this nature is never accorded by the Court unless the petitioner be prompt in seeking it and sincere in the motive for doing so. A petitioner made cognizant within four or five years after her marriage of her husband's impotency could not delay proceedings for three years more without being open to the charge of want of sincerity or promptitude.

Affirmed 2 P. & D. 300

THE petitioner prayed for a decree of nullity of marriage on the ground of her husband's impotency. The respondent denied the charge, and alleged that the marriage had, in fact, been consummated. The cause was heard before the Judge Ordinary in camerâ on the 3rd and 7th of February, 1872. The facts are sufficiently set out in the judgment.

Dr. Deane, Q.C., and *Dr. Swabey*, were for the petitioner.
Inderwick, for the respondent.

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THE JUDGE ORDINARY. The burthen of proof in this case lies on the petitioner. She has to establish affirmatively the propositions that her marriage has not been consummated, and that the respondent is incurably impotent. The fact that this suit was not commenced until the lapse of nine years after the celebration of the marriage renders this burthen peculiarly onerous. For lapse of time, independently of its effect as a bar to relief, upon grounds often recognized in this Court, has always an important bearing on the evidence by which the charge of impotency is sought to be established, and upon the measure of proof to be required.

It is material to state at the outset that the ordinary medium of proof in cases of this kind is in this case wanting. The petitioner is not proved by medical examination to be a virgin. Neither of the two medical witnesses called on her behalf can affirm, from the physical appearances (even as a matter of strong probability), that sexual connection has never taken place. The utmost support that their evidence affords to the petitioner's case is this, that the appearances are not such as they would have expected if the respondent's story of continued intercourse had been true and free from exaggeration. But on this point it is to be borne in mind that the examination of the petitioner's person was not made until long after all cohabitation had ceased. As direct proof of the petitioner's virginity, the medical evidence wholly fails. The whole matter virtually rests, therefore, on the petitioner's own account. Of this, it is enough to say that she represents the respondent as having from the first shewn no desire for sexual intercourse, as having avoided sleeping with her, and when, after the lapse of some years, pressed by her to consummate the marriage, as having declared himself unable to do so. Further, she accounts for the absence of the ordinary signs of virginity by deposing to certain practices by her husband, upon which, in the view I take of this case, it is not necessary to dwell.

The whole of the petitioner's story is denied by the respondent, who swears that he had intercourse with his wife within a day after the marriage, and continued to do so at intervals throughout their cohabitation.

In this conflict of testimony between those who alone know the truth, the Court naturally turns to external facts, and to such con-

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clusions as the conduct of the parties may offer by way of corroboration. And a natural question to ask is this: When did the petitioner first become aware of the alleged deficiencies of her husband, and how did she conduct herself upon that discovery?

The marriage took place in December, 1863. In the autumn of 1866 the parties were in Paris, and the petitioner's mother was there with them. She had been married nearly three years; she declares herself to have made repeated attempts to get the respondent to sleep with her, and she represents him as uniformly repulsing all overtures on her part of caress or endearment. It would be natural that some complaint of this conduct should be made between mother and daughter; and, if it had, there is little doubt that such complaint would have led to questions and the disclosure of what she now alleges was the true state of things. Yet she made no communication whatever to her mother. Two more years passed away, without complaint or remonstrance, the parties still living on the continent and moving about from place to place. Early in the year 1868 the petitioner accompanied her mother to England, to attend the marriage of the petitioner's sister. And about this time the petitioner deposes that she had a full conversation with her sister, in which she disclosed her husband's conduct, and in which her sister made her fully acquainted with the wrong of which she now complains. Upon this, she says, she wrote to the respondent, asserting her rights, and on her return to him in France insisted on sleeping with him, which she did for three months. But, according to her account, the respondent was unable to consummate the marriage, and admitted that he was so.

Here, then, we arrive at a full knowledge on the petitioner's part of her own rights and her husband's deficiencies. What step does she take? Assuming her to feel and suffer under the wrong done her (an assumption which is the basis of her present suit), what steps would she probably take? Would she not again speak to her sister, then a married woman? Would she not revive the subject which had been previously discussed, and apparently without hesitation, between them? Or, having once spoken to her sister, would she not have taken her mother's advice? As a matter of probability it is impossible, I think, to answer these questions in

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the negative. But she speaks to no one on the subject, and makes no complaint to her relations.

At this period there is some very cogent testimony produced by the respondent, to prove that no cause for complaint really existed. For in the autumn in this same year, 1868, the parties were living at Norwood, and a surgeon is produced from that place who declares that the petitioner consulted him as to her being pregnant. His recollection of the advice which he gave is imperfect, and he cannot now be certain as to the opinion he formed; but he speaks with confidence to the fact that the inquiry was certainly made of him by the petitioner. His story is corroborated and amplified by the respondent, though denied by the petitioner and her mother, but it cannot fail to be regarded as entitled to considerable credence. I may add that the manner in which the petitioner denied all knowledge of this incident was not such as favourably to impress the Court.

Another year passed away; still no complaint or communication to her family is made by the petitioner, though she is on good terms with her mother and in correspondence with her sister. On the contrary, a letter is put in evidence, written at this time (the autumn of 1869) to the petitioner by her sister, in which she says, "We had your sweet letter yesterday morning and were delighted to know how *happy* you are in your own pretty home?" Shortly after this, the petitioner alleges that the respondent became unkind to her; used bad language, and on one or two occasions struck her. Whether this be true or not, it is undoubted that about November in this year, 1869, the petitioner, with the respondent's consent, left him and came to England on a visit to her mother, with whom she remained nearly five months, at the expiration of which the respondent joined them in the Isle of Wight, in February or March, 1870. At this period it is undoubted they had serious disagreements. It is also undoubted that at this time the respondent discovered by means of an anonymous letter that his wife had been carrying on a clandestine correspondence with a gentleman named Y., whom she had known in Paris, and whose attentions to her there had been observed and complained of by her husband. From this gentleman she admitted she had received letters addressed to her by initials only, and directed to the post office.

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Such an occurrence may have had some effect in bringing about an event which speedily followed. According to her account, she soon after this told the respondent she would not live with him, and he took a separate apartment. According to his, she called him a coward and a beggar, and said she would "make an end of it." According to both, a negotiation was set on foot for a separation. Attorneys were employed on both sides, and a deed of separation executed on the 28th of August, 1870, under which the petitioner, who had an income of 500*l.* a year, agreed to allow 100*l.* a year to the respondent, who had no means of his own.

From this time they lived apart, and nothing occurred until six months afterwards, when the petitioner, in February or March, 1871, had a conversation with her aunt, which led to her being questioned by her uncle, and she then, as she alleges, for the first time learnt that the remedy she now seeks was open to her, and this suit was forthwith commenced.

Upon this history of the married life of these parties the Court has to ask itself whether the petitioner's conduct is such as to corroborate her account or that of her husband.

Giving the petitioner credit for a reticence which might be natural while she remained in partial ignorance upon sexual subjects, it is difficult to account, if her account be true, for a continuance of that reserve after 1868, when she knew all that she knows now, and when she had already confided in her married sister. But her total silence at the time of her separation is more significant still. Here were the husband and wife violently opposed to one another, the petitioner supported by her mother, within reach of her sister and friends, in communication with lawyers, incensed against her husband, and struggling for the means of getting away from him with as little sacrifice of her income as possible; she had, if her story is trustworthy, for two years at least known of her husband's impotency, and had resented it, and yet, so far as appears in evidence, to no member of her family or friend, and to no lawyer, did she then make any allusion to the wrong from which she now alleges she had all along suffered. She might not, indeed, have been aware of the possibility of such a suit as this; but it is hardly credible that this wrong, if it existed, should not, even to her female relations, have found utterance at such a

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time, and have been included among the grievances which she then laid to her husband's charge. In the face of this conduct on her part, bearing in mind that the oath of the respondent is set against hers throughout, and that the onus of proof lies upon her, I cannot judicially hold that she has established the facts upon which she claims relief. But if she had, some impediments would still remain.

Relief in suits of this nature is never accorded by the Court unless the petitioner be prompt in seeking it and sincere in the motive for doing so. The failure of proof on the issue of fact makes it needless to enlarge on these two conditions in the present case. But I cannot hesitate to say that if the petitioner was, as she alleges, made cognizant within four or five years after her marriage of her husband's impotency, she could not delay these proceedings for three years more without being open to the charge of a want of sincerity or promptitude. In saying this I am not forgetful of the fact that she may not have known that such a suit as this could be entertained. But the requirement of promptitude could never be enforced by this Court if it were first necessary to prove the existence of such knowledge. The general circumstances of each case and the facilities of the party aggrieved for obtaining legal advice and assistance will vary indefinitely, but the conditions to which I have alluded mean nothing if they do not mean this,—that the petitioner is bound to have evinced impatience under a sense of wrong, and a reasonable activity in complaint and redress.

The Court cannot recognize these features in the conduct of the petitioner. On the contrary, she appears to have lived contentedly enough with her husband until, as she says, he ill-treated her, and if the impression of one of the witnesses was correct, she was more moved to the institution of this suit when she first heard that it was open to her by the prospect of getting quit of the burthen of supporting the respondent than by anything else.

The petition must, therefore, be dismissed, and as the petitioner has a separate income, she must, I think, pay the costs of the suit.

Attorneys for petitioner: *Leather & Maynard.*
Attorneys for respondent: *Bothamleys & Freeman.*

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July 2.

TEMPLETON *v.* TYREE AND TEMPLETON, FALSELY CALLED TYREE.

Nullity of Marriage—Undue Publication of Banns—Fraud—4 Geo. 4, c. 76, s. 22.

A man gave notice for the publication of his marriage with a woman who was feeble both in health and mind. Such notice did not contain any material variation from the correct names of the parties. The woman had no knowledge that the notice was given or of the publication of the banns. The man only proposed marriage to her on the day before the ceremony took place :—

Held, that the parties did not knowingly intermarry without due publication of banns, and that the marriage was valid.

THIS was a suit instituted by Mr. Templeton to obtain a decree declaring a marriage entered into by his daughter, Frances Templeton, with the respondent, George Tyree, null and void by reason of undue publication of banns and fraud. It was undefended.

It was proved that the respondent's name was Frances Templeton, and that she was born on the 20th of November, 1856. She was married on the 4th of February, 1872. The banns were published at the church of St. Thomas, in the chapelry of Crookes, which was not the chapelry or parish within which the parties, or either of them, resided. In the banns they were described as George Tyree and Fanny Templeton, both of Common Side, in the chapelry of Crookes. In the register book their ages were stated to be respectively twenty-one and nineteen years. The female respondent had no knowledge of the intended marriage until the day before its celebration. She was told by Mrs. Wright, the sister of George Tyree, that she was going to be married ; she asked, to whom ; and Mrs. Wright answered, to her brother. After the ceremony the parties separated, and the woman returned to her father's house. The marriage has never been consummated. The woman had suffered from St. Vitus's dance from her infancy, and was so far weak in mind that she could not be educated to the extent usual with persons in her position of life.

June 27. *Waddy* appeared for the petitioner, and submitted that the marriage was void by reason of undue publication of banns, the girl at the time not having been cognizant that they were being

published; and also in consequence of the false statements therein as to name and residence. 1872

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Cur. adv. vult.

July 2. THE JUDGE ORDINARY. In this case I was asked to make a decree of nullity of marriage on the evidence which was laid before me. The circumstances of this case are these. The husband is a young man of twenty-two years of age; he induced the respondent—a woman only fifteen years of age, who had been afflicted with St. Vitus's dance from her infancy, and was not strong either in health or mind—to become his wife. He himself put up the banns, and made no proposals to the woman until the day before the marriage actually took place. She had no hand in putting up the banns; indeed, she did not know what had been done even at the time of marriage. She had an idea that some formality was required, and said so; but the sister of Mr. Tyree satisfied her objections by telling her that all had been done that was necessary, and that everything had been arranged. The woman immediately after the ceremony returned to her parents house, and has remained there ever since. Some criminal proceedings were afterwards commenced against the man, the exact object of which was not disclosed in the evidence. It seems, however, that at some future day the girl will be entitled to property; and that is all the Court knows about the matter. The petitioner asks that the marriage of his daughter may be declared null and void on the grounds that the banns were not duly published, and of fraud. As regards the first point, the authority of this Court depends upon the words of the statute (4 Geo. 4, c. 76). The 22nd section enacts that, if any persons shall knowingly and wilfully intermarry without due publication of banns, such marriage shall be null and void. The question for my consideration is, what is the meaning and extent of these words? At the hearing I pointed out to Mr. Waddy that the run of the decisions was all in one direction. It is necessary, in order to invalidate a marriage, that both parties should be cognizant of the imperfect publication. At his request, however, I deferred my final determination, to enable me to look once more through the cases, and to consider whether they justify the Court in setting aside this marriage. The first

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case I will notice is *Rex* v. *Inhabitants of Wroxton*. (1) In that case the man had deceived the woman altogether; nevertheless, as the woman was not a party to the false publication of banns, it was held that the marriage was not void. In *Tongue* v. *Allen* (2) the suit was instituted by the father of a minor, a boy at school, to annul his marriage with a woman thirty-five years of age, and a widow. The instructions for the publication of banns were given by the woman, and they omitted the Christian name of the minor by which he was most generally known. The Court was of opinion that both parties were cognizant of the fraud, and annulled the marriage. In *Wright* v. *Elwood* (3) the husband caused banns of marriage to be published between himself and Emma Elwood, spinster. The proper description of the woman was Amelia Elwood, the wife of Harlow Elwood, who was living at that time, but died before the celebration of the marriage. Mr. Wright fully believed that Mrs. Elwood was a spinster, so that there was no false publication of banns with the consent and connivance of both parties, and the marriage was declared valid. I have adverted to these cases because in each of them one party was innocent and the other to be blamed in the transaction. Moreover, it was the innocent party that endeavoured to set aside the marriage on the ground of irregularity. All the Courts, however, both Common Law and Ecclesiastical, held that it is absolutely necessary to prove that both parties are cognizant at the time of the undue publication in order to bring the case within the statute and to fulfil the exigency of the words "shall knowingly and wilfully intermarry without due publication of banns." In this case the woman had no knowledge at all of the publication until after the marriage. On the ground, therefore, of undue publication I have no power to make the decree which I am asked to make. But it is said further that I might set aside the marriage by reason of abduction and fraud; and Miss Turner's case was relied on for this proposition. This Court has no power except such as was given it by the statute 20 & 21 Vict. c. 85, and the power so given was that exercised in similar cases in the Ecclesiastical Courts. But in Miss Turner's case the House of Lords passed a special Act of Parliament to

(1) 4 B. & Ad. 640. (2) 1 Curt. 38.

(3) 1 Curt. 49, 662.

dissolve the marriage, which was assented to by the other House. Such a proceeding has no sort of analogy to a suit instituted in this court; in fact, it was merely an act of legislation. The circumstances, too, of this case do not disclose such imposition and fraud as was practised upon Miss Turner; for although the girl was not very bright, she knew perfectly well what she was about, and was a willing actor in the ceremony. I dismiss the petition.

Attorney: *J. H. Hicken.*

GREAVES *v.* GREAVES.

May 24.

Marriage Licence—4 Geo. 4, *c.* 76, *s.* 22—*Marriage celebrated without Licence.*

A marriage is valid although celebrated without banns or licence first had and obtained, unless both the parties were aware at the time of the ceremony of the absence of banns and licence.

A man applied for a licence on the 17th of June, and was married on the 18th of June, and the licence was not issued until the 19th of June. At the time when the ceremony was performed he was aware of the non-existence of the licence, but the woman was not. The marriage was held to be valid, as the parties had not wilfully intermarried without licence.

THE petitioner alleged a marriage at the parish church of Bradford, in Yorkshire, on the 18th of June, 1857, subsequent cohabitation, and cruelty and adultery of the husband, and prayed for a judicial separation on these grounds. The respondent, in his answer, alleged, that the petitioner was not lawfully married to him as alleged, and traversed the cruelty and adultery alleged. An order for particulars of the first paragraph of the answer was obtained, and the following particulars were delivered: "Under the 1st paragraph of his answer the defendant will seek to prove, that at the time and place in the petition mentioned the petitioner and respondent did knowingly and wilfully intermarry, without due publication of banns or any licence first had and obtained in that behalf, and this was the ceremony of marriage in the petition mentioned." The issue as to the validity of the marriage was ordered to be tried before the other issues raised by the pleadings, and it was heard by the judge ordinary without a jury.

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There was no dispute as to the non-existence of the licence on the 18th of June, when the marriage was celebrated. Application had been made for it on the 17th of June, but it was not issued until the 19th of June. The petitioner stated that she was aware that the respondent had applied for the licence on the 17th of June, and that on the same day he informed her that the vicar, Dr. Burnet, had said that the licence would be issued, and it would be all right; that she did not know it was necessary to send to Richmond for a licence; that nothing was said to her, or in her presence, about a licence on the morning of the marriage before it was celebrated; that she did not know the licence was not then in existence, but supposed that all the necessary steps had been taken to render the marriage lawful, and that if she had been aware of any irregularity she would have deferred the ceremony. The respondent stated that on the 17th the vicar told him that there would not be time to get a licence from Richmond by the next morning, but the marriage need not be put off, and he would marry them and take the risk; and that he told the petitioner what had passed with the vicar, and she was aware of the facts at the time when the ceremony was performed.

Serjt. Simon, and *Searle*, were for the petitioner.

Dr. Deane, Q.C., and *Bayford*, for the respondent.

The 22nd section of 4 Geo. 4, c. 76, and *Dormer* v. *Williams* (1) were referred to.

THE JUDGE ORDINARY. The statute provides that a marriage shall be null and void if the persons knowingly and wilfully intermarry without a certain formality, namely, a licence from a proper person being first had and obtained. The parties in this case did no doubt intermarry without a licence first had and obtained; but the question is, whether they did so knowingly and wilfully. I understand the meaning of this provision to be that the marriage is only to be annulled if it is established affirmatively to the satisfaction of the Court, that at the time when the ceremony was solemnized both parties were cognizant of the fact that a licence had not issued, and being cognizant of that fact wilfully inter-

(1) 1 Curt. 870.

married. It may be a question whether, if either party was not aware that a licence was necessary, although cognizant of the fact that there was no licence, he or she could be considered to have "wilfully" intermarried without a licence. It may be argued that it is not an unfair interpretation of the statute that, in order to bring a marriage without a licence within the scope of its provisions, both parties must be aware that a licence is a necessary formality, besides being aware that no licence is in existence. But I need not dwell on this question, because assuming that the statute is more stringent, and that it avoids a marriage, even if one of the parties did not know that a licence was a necessary formality, if he or she was cognizant of the fact that no licence was in existence, still I am of opinion that Mrs. Greaves is entitled to a decree, because I do not believe that at the time of the marriage she knew that the licence had not issued. [After stating the evidence of the petitioner and the respondent, his lordship said] that the Court gave credit to the account of the petitioner and not to that of the respondent. A woman would be very particular in seeing that everything was done which she believed to be essential to the validity of the marriage. She had no motive for hastening the marriage, and had she known of the non-existence of the licence she would no doubt have postponed it to some future day. In cases of this kind, where it is sought to set aside a marriage under the 22nd section, on account of the proper formalities not having been observed, the Court ought to be very well satisfied of the affirmative before pronouncing a marriage null. The Court pronounces for the validity of this marriage, with the costs of that issue, and the petitioner will be allowed to proceed and prove the rest of the allegations in her petition.

Attorneys for petitioner: *Blakely & Berwick.*
Attorneys for respondent: *Torr, Janeway, Tagart, & Janeway.*

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April 28.

CRISP *v.* CRISP.

Settlements—22 & 23 *Vict. c.* 61, *s.* 5—*Children's Interest in Settlements.*

The Court has no power to vary a marriage settlement, so as to deprive an infant child of the marriage of an interest secured to it by such settlement.

A DECREE absolute for the dissolution of the marriage, having been pronounced at the instance of the wife, she had presented a petition for a variation of settlements under the & 23 Vict. c. 61, s. 5. The parties had subsequently agreed to an arrangement which they desired to carry out by means of an order of the Court.

The proposed arrangement and the question to which it gave rise, are stated in the following report of the registrar:—

"In this case I have seen the solicitors of the petitioner and respondent. The order that the Court will be requested to make is so peculiar that I forbear to suggest any form of order, and merely raise the question for the opinion of the Court whether any such order can be made. By marriage settlement dated the 3rd of October, 1866, certain funds were settled in the usual way in favour of the respondent and petitioner successively for life, with remainder to the children of the marriage. There is one child an infant. It is agreed that the Court shall be asked to extinguish the life interest of the respondent in this settlement, provided that it will deal with a post-nuptial settlement in the manner proposed. With this report, I forward the terms of the agreement that has been entered into. By post-nuptial settlement, dated the 9th of July, 1867, there was settled the moiety of a farm in Norfolk (the whole farm has been valued at 2460*l.*) and 1000*l.* since invested in consols (the two properties, however, being subject to a mortgage, which, with interest due, amounts to 850*l.*), on the father and mother of the respondent, who are both living, the respondent and the petitioner successively for life, remainder to the issue of the marriage. I am informed that the parties to this suit have been advised that this settlement being a voluntary one, may be set aside. I have suggested that it might be better that this should be done by a Court of equity instead of its being done in effect by an order of this Court. The proposal, however, which is submitted to this Court is that the interests of the parties to the suit and of the child of the marriage under this settlement should

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be extinguished, and in lieu thereof that 500*l.* should be settled on the petitioner for life, with remainder to the child. The reversion to the child of the property in question has been valued at 217*l.* only, probably nearly the same as the reversion of the 500*l.*; but in truth forced sales of reversions are no real test of their value to the persons entitled to them, and I doubt if any man of business would advise any person entitled to a reversion on the death of a person considerably older than himself to part with it if it could be avoided. I cannot therefore report that I consider this arrangement beneficial for the child unless the Court will treat the post-nuptial settlement as inoperative."

April 7. *Searle*, for the petitioner, moved for an order in the erms of the agreement, and submitted that it would clearly be to the advantage of the child to have a certain sum of 500*l.*, instead of a reversion of doubtful value.

Inderwick, for the respondent and the other parties interested, supported the motion.

Cur. adv. vult.

April 28. THE JUDGE ORDINARY. I took time to consider whether it was within the powers conferred on this Court by the statute, to carry out the desire of the parties by making an order that would affect a voluntary settlement entered into after their marriage under which the child of the marriage takes a certain interest in the property settled. Upon consideration, I am of opinion that to do so, however much the Court may desire to carry out the arrangement, would exceed the powers conferred on it by the statute. It is suggested that this settlement is one that may be set aside by another Court; but if that be so, it does not follow that this Court has power to set it aside. Although it may be true that, judging from the ordinary duration of life, and the probability of the different events contemplated by the settlement, the child would perhaps derive a larger benefit from the proposed alteration than it could do under the terms of the settlement, the Court is not at liberty to enter into such a speculation, and I must reject the motion.

Attorneys for petitioner: *Townley & Ford.*

Attorneys for respondent: *White, Borrett, & White.*

1872
May 4.

GOWER *v.* GOWER, PEARSON, HILL, AND BUNN.

Suit for Dissolution—Respondent's Adultery brought about by Petitioner's Agent—Petition dismissed.

If a person employed by a husband to watch his wife for the purpose of obtaining evidence of her adultery, brings about an act of adultery, the husband cannot obtain a decree of dissolution on the ground of such adultery, although he may not have directed or authorized his agent to bring it about.

Sugg v. *Sugg and Moore* (31 L. J. (P. M. & A.) 41), considered.

Picken v. *Picken and Simmonds* (34 L. J. (P. M. & A.) 22), affirmed.

THE petitioner was the son of a coal merchant and contractor, in the neighbourhood of Dudley. He married the respondent in 1864, and cohabited with her until the autumn of 1867, when he separated from her in consequence, as he alleged, of her habitual extravagance and intoxication. A deed of separation was executed in May, 1868, by which an allowance was secured to her, and the present petition for dissolution of marriage, alleged that she had been guilty of divers acts of adultery since the separation. The respondent, in her answer, denied the adultery charged, and made counter charges of cruelty and connivance, and further alleged as follows:—

"That the petitioner has been guilty of wilful neglect and misconduct, conducing to the alleged adultery, if any, inasmuch as the petitioner has, since the month of August, 1867, always lived separate and apart from the said respondent, and has engaged himself to be married to another woman, and solicited and procured the co-respondent, Joseph Hill, to induce the respondent to commit adultery, in order that the petitioner might obtain a divorce from the respondent."

Pearson filed an answer traversing the adultery. Hill appeared, but filed no answer, and Bunn did not appear. The cause was heard before the Judge Ordinary, without a jury, on the 1st, 2nd, 3rd, and 4th of May, 1872. The Judge Ordinary came to the conclusion that the petitioner had failed to establish the adultery charged with Pearson and Bunn, and that the respondent had failed to establish the charge of cruelty.

The adultery with Hill was alleged to have been committed whilst the respondent was residing at a public-house at Old Swin-

ford, near Stourbridge, called the Seven Stars, of which Pearson was the landlord. Hill was a visitor at this house, and there made the respondent's acquaintance. It was proved, and not denied, that the respondent and Hill and some other persons had gone together from the Seven Stars, on a pleasure excursion, and that they had been absent for three or four days, and visited Worcester, Wolverhampton, and Birmingham, passing a night at each place. The respondent and Hill further admitted that they had been in bed together at one or more of those places, but they denied that they had been guilty of adultery. A man named Williams, and a woman of the town who passed as his wife, and a man named Gooding, with a woman who passed as his wife, accompanied them on the excursion; and their case was, that Williams, who had been employed by the petitioner to obtain evidence of adultery against the respondent, had planned the excursion for the purpose of bringing about their adultery; that he had made them both intoxicated, and when they were insensible had put them to bed together. The petitioner admitted that some short time before the excursion he had employed Williams to watch the respondent, and to obtain evidence of her adultery, but denied that he ever instigated him to induce her to commit adultery, or sanctioned his taking any steps with that view. Neither Williams nor Golding was produced as a witness.

Montagu Chambers, *Q.C.* (*Dr. Spinks, Q.C.*, and *Lord*, with him), for the petitioner, submitted that if the adultery with Hill was proved, the petitioner was entitled to a decree whatever conclusion the Court might come to as to Williams's conduct, the petitioner not having sanctioned it, and being in no way responsible for it: *Sugg* v. *Sugg and Moore*. (1)

Huddleston, Q.C. (*Day, Q.C.*, and *E. Ashley*, with him), for the respondent, relied on *Picken* v. *Picken & Simmonds* (2), and submitted that the petitioner was not entitled to a decree, by reason of an act of adultery, which even if committed, had been brought about by his own agent.

Greenhow, was for the co-respondent Pearce.

(1) 31 L. J. (P. M. & A.) 41. (2) 34 L. J. (P. M. & A.) 22.

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THE JUDGE ORDINARY. The evidence in this case gives rise to several questions, the first of which is whether the husband is proved to have been guilty of cruelty. The parties lived together for about three years after their marriage, and in the autumn of 1867 the wife left the husband's home and went to reside with her parents. An execution being put into the husband's house she continued with her parents; her father brought an action against the husband for maintenance, and in the result a deed of separation was executed in January, 1868. I think the respondent has made out no case of cruelty, and that the separation came about in consequence of her habits of extravagance and intemperance. Under the deed the petitioner contracted to allow her 1*l.* a week, and he appears to have paid that sum regularly through his solicitor. In 1870, he is said to have discovered that she had committed adultery. Now I must repeat what I have often had occasion to say in previous cases; that there is a wide difference between the position of a husband living contentedly with his wife and being told by some one of her adultery, and that of a husband living apart from her, and subject to a money payment for her support. The discovery in the one case is a source of pain and discomfort, while in the other it is a source of relief, as it may lead to a divorce. In the first case the husband receives the evidence brought to his knowledge with reluctance and distrust, and it is only when the matter is forced upon him by evidence from which he cannot withhold his assent that he takes it up; but in a case like the present the husband is, as it were, on the look-out for evidence, and those who may have seen or heard anything against the wife, instead of being reluctant to let him know it, are prone to come forward because they are sure their tale will be well received, and the husband will be glad to hear that there is a means of escaping from the bond he has contracted. This is one of the latter class of cases, and the Court is therefore bound to watch the evidence narrowly. [Having reviewed the evidence as to the charges of adultery with Pearson and Bunn, and stated his conclusion that neither charge was made out to his satisfaction, his Lordship proceeded as follows:—] The main issue for the consideration of the Court is as to the adultery with Hill. It no doubt involves a question of law, but the first question is one of fact. Did Williams, on the

journey to Worcester, act merely as a person who went to see what was going on there? Or was he the person who brought the journey about? Or even if he did not bring the journey about, did he try to bring the respondent and Hill together, and endeavour to induce them to commit adultery? The matter may be viewed in two opposite aspects; one is, that Williams having been told to watch the respondent, and having access to the public-house where she lived, and where the co-respondent was a constant visitor, may have ascertained that they had planned a journey to Worcester together, and being then in the petitioner's pay, may have taken advantage of the circumstance to join the party, in order to find out what was going on. If he confined himself to that course he would be within the first proposition, and would merely be acting as a witness who could prove the adultery. But the other aspect of the matter is very different; it is that, being at the public-house, and able to converse there with the respondent, he may have forced himself upon the acquaintance of the co-respondent and plied him with drink, and may have suggested the journey to Worcester—nay, he may have arranged the journey himself, and may have induced these two people to start from the Seven Stars to go upon a short jaunt, from which they were to return the same evening, he all the while intending to carry them to Worcester. He may have persuaded them to go to Worcester without their having the slightest idea of criminality, and may then have induced them to go to a public-house and encouraged them to get drunk, and suggested their occupying the same bed. The respondent and co-respondent go further, for they say he had them put to bed when they were so drunk as to be unconscious. Without going so far as that, it is obvious that the view I have suggested is a possible and not a very improbable one.

The account given by the respondent and Hill is that they were persuaded into this visit to Worcester by Williams, that neither of them had any notion of staying the night or of sleeping together, and that Williams paid all the expenses. They add that they did not even know they had gone to bed. When these two aspects of the case are presented to the Court, how very material it is that Williams should be produced to say which story is the true one. If Williams was acting, as the petitioner says he was, as his agent

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merely for the purpose of watching what occurred, why is not Williams here, and why was he not called at the outset of the petitioner's case? It might be very desirable to corroborate him by the evidence of other persons, but he is the first and most material witness to explain how it came about that they were together, and that he went with them. He might be able to tell us who it was that arranged they should sleep together after they arrived at the inn. Golding also was a member of the party; he was paid something by a person who got the money from the petitioner's attorney, and he is not called. If the evidence of the respondent and Hill as to what occurred is not true, how is it that those people who belonged to the party were not called to contradict them? In the total absence of any evidence on the other side, the Court cannot but give credence to their story so far as to believe that Williams induced and brought about their going to bed together. To what extent they were intoxicated when they went to bed it might be difficult to ascertain; but that they were brought to the place by the contrivance of Williams, for the purpose of being discovered committing adultery, is the conclusion at which the Court is forced to arrive.

Thereupon the question of law arises, and it is argued that, if the case can be carried no further, the petitioner is entitled to a decree. The case of *Sugg* v. *Sugg and Moore* (1) was relied on; but that is not a very satisfactory authority on which to decide an important question of law, because it is the report of a summing-up to a jury, in which the learned judge would be more diffuse than in giving judgment, and might very possibly use expressions which did not convey his precise meaning. Besides, the question in that case was whether there had been collusion between the petitioner and the co-respondent and other persons. The allegation in the answer was that "the petitioner, in collusion with the co-respondent and with divers other persons, in or about the month of October, 1860, procured the defilement of the respondent by the co-respondent, which is the adultery (if any) alleged in his petition;" and it was in reference to that allegation that the learned judge made the following observations upon which the petitioner relies:—

(1) 31 L. J. (P. M. & A.) 41.

"On the part of the respondent it is said that this was an offer of money to induce either Axford or Moore to betray the woman into committing adultery again, in order that they might be able to prove it; and if Walter Sugg did give the money for that purpose and with that object, with the knowledge and the concurrence of the petitioner, I think that the petitioner would not be able to avail himself of the proof of the adultery so committed. But it is one thing to say to a man, 'You will watch this woman, so as to be able to give evidence that she has committed an act of adultery,' and another thing to say, 'You will betray her into committing an act of adultery.' There is no direct proof on the point, but still you may infer from the evidence that the husband was privy to what was done by Walter Sugg, and that there was no dissent on his part; but there is an absence of any evidence that the husband arranged with him that he should procure some person to commit adultery with Mrs. Sugg—that he should hire an adulterer and procure her defilement. If a husband, believing his wife to be chaste, were to attempt in any way to place her in a situation where she would be likely to fall—if he were to induce a man to set about to seduce and to defile her—nothing could be more base and detestable than such conduct, or more dangerous to society. But it is a very different thing to obtain evidence against a woman who is living as an abandoned prostitute. If Axford made an arrangement with Moore, and said, 'Now, Moore, they have offered me 5*l.* to get evidence, and if you will commit adultery you shall go shares with me,' that would not affect the husband. There would be no corrupt agreement on his part, even supposing that Axford got Moore to join the party at the public-house at Barnet, in order that they might get the 5*l.*; that would not affect the petitioner's case."

If by these observations the learned judge merely intended to convey that it was not a necessary result of the evidence that the petitioner was acting in collusion with the co-respondent, that may be so; but I desire to state distinctly and broadly, in order that, if I am wrong, I may be corrected by a Court of appeal, that in my opinion, if a husband employs a man to get evidence of adultery upon which to obtain a divorce, and the man so employed sets about to procure the defilement of the wife, and by the interven-

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tion of that man the wife is purposely induced to commit adultery, the petitioner has no right to a remedy in this court for such adultery; and I further think that the husband would have no right to a remedy even if it were proved that he had not given any distinct orders for the purpose.

The law of principal and agent has been adverted to in argument; and no doubt an agent cannot bind a principal except within the scope of his employment. But it is one thing to say that a principal is not responsible for the act of the agent, for which he had no authority, and another thing to say that he can take advantage of an act procured by the agent by means of false representations, on the score that he did not give authority for those false representations. I think it will be found to be good law that, if an agent procures a contract by false representations, the principal cannot take advantage of the contract so obtained. Therefore it is not necessary for me to determine whether Mr. Gower did give authority to Williams to bring about what was brought about. I have no reason to think that Mr. Gower has kept back anything from the Court. He gave his evidence in a very straightforward manner, and like a man of honour; and I think it quite possible that he did not tell Williams to do what Williams appears to have done; but at the same time, he never warned him not to do what a man of his class and character would be likely to do. The very first thing that would occur to such a man, if evidence were not forthcoming, would be to make an occasion which should furnish that evidence. In that point of view the petitioner is responsible for the act of his agent. But I decide the case on the broader ground that the petitioner cannot obtain the benefit of redress in this court for an act of adultery brought about by his own agent. I dismiss the petition, with the costs of the respondent and of the co-respondent Pearson.

Attorneys for petitioner: *Combe & Wainwright.*
Attorneys for respondent: *Walker & Son.*

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March 14.

Dissolution—Jurisdiction—Domicile—Delay—Wife's Costs of Counter Charges.

A Scotchman married a Scotchwoman in Scotland, and cohabited with her in Scotland until he discovered her adultery. He thereupon, in 1866, broke up his home and removed to England; and in 1871 he instituted a suit in England for the dissolution of his marriage on the ground of the adultery committed in Scotland previous to the separation. He swore in his examination that he had left Scotland with the intention of taking up his permanent abode in England.

The Court, believing his evidence, held that he had abandoned his domicile of origin and acquired an English domicile, and that it had jurisdiction to dissolve the marriage.

The oath of the person whose domicile is in question as to his intention to change his domicile is not conclusive, but the question for the Court is whether, upon a review of all the circumstances, it gives credit to his evidence.

Adultery was committed in 1866, and a suit was instituted in 1871. The petitioner was a material witness on the issue of adultery. The inadmissibility of his evidence until after August, 1869, when the Evidence Further Amendment Act was passed, was accepted as sufficient explanation of the delay. Want of means is also a sufficient excuse for delay.

The wife's costs of counter charges of adultery against her husband were disallowed, although they had been paid into court, the evidence by which those counter charges were supported being false, and there being no reasonable ground for making them.

THE petitioner, George James Wilson, prayed for the dissolution of his marriage with the respondent, Mary Stuart Craigie Halketh Wilson, on the ground of her adultery with Archibald Howell. The respondent traversed the charge of adultery, and made numerous counter charges of adultery against the petitioner, and further alleged that he had been guilty of cruelty and of unreasonable delay. The answer further alleged, as a plea to the jurisdiction, that the petitioner and respondent were domiciled in Scotland, and that the marriage was contracted in Scotland, and the alleged adultery was committed in Scotland. (1) The petitioner took issue on this answer.

The alleged adulterer, Howell, had originally been made a co-respondent, but having appeared under protest and pleaded to the jurisdiction, the Court, at the instance of the petitioner, dismissed him from the suit. (2)

(1) Ante, p. 341. (2) Ante, p. 353.

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The issues joined between the petitioner and the respondent were heard before the Judge Ordinary without a jury on the 8th, 9th, 10th, 11th, and 30th of May, 1872.

A number of witnesses on both sides, including the petitioner and the respondent and the alleged adulterer, were examined; but it is unnecessary to state the facts of the case, except so far as they bear on the question of jurisdiction. The petitioner was a Scotchman by birth, and he married the respondent, a Scotch woman, in Scotland, on the 9th of July, 1861. They cohabited in Scotland until November, 1866, when the petitioner separated from the respondent in consequence of discovering her adultery with Howell, his butler. Immediately after the separation he came to England, where his mother was residing, and he had lived with her up to the time when the cause came on for hearing, first, at Surbiton, and afterwards at Anerley, in the county of Surrey. He had from time to time visited Scotland, and he retained the lease of a shooting lodge on Loch Lomond, called the Ptarmigan, which he had built before the separation. He was a partner in some ironworks in Scotland, from which his income was derived, but he took no part in the management of the business; and he swore that he had no intention of returning to Scotland, and that when he left it towards the end of 1866, it was with the intention of permanently residing in England.

Sir J. Karslake, Q.C. (*Dr. Spinks, Q.C.*, and *Inderwick*, with him), for the respondent. The petitioner's oath as to his intention is not sufficient to satisfy the Court of his change of domicile: *Manning* v. *Manning*. (1) The fact that he has acquired no residence of his own in England, but is merely a visitor at his mother's house, that his business is in Scotland, that he retains the Ptarmigan shooting lodge, that he continues his subscription to a club in Glasgow, and that there are expressions in some of his letters indicating a desire to return to Scotland, as soon as he is released from his pecuniary difficulties ought to lead the Court to the conclusion that notwithstanding his declaration of intention he has never lost his domicile of origin. It is doubtful whether the Court was right in assuming jurisdiction in *Brodie* v. *Brodie* (2),

(1) Ante, p. 223. (2) 2 Sw. & Tr. 259.; 30 L. J. (P. M. & A.) 185.

and the point was not argued, but the petitioner has not even the permanent and bonâ fide residence which was considered necessary to found the jurisdiction in that case.

All the evidence relating to the respondent's adultery which has been laid before the Court, was known to the petitioner at the time of the separation or very shortly afterwards. He ought not to have waited from 1866 until April 1871, when this suit was instituted, before taking proceedings, and the delay must be considered unreasonable.

O'Malley, Q.C. (*Dr. Deane, Q.C.*, and *Searle* with him), for the petitioner. It is not denied that the petitioner has in fact resided in England since 1866, and the only question is whether the Court gives credit to his evidence, that when he broke up his establishment in Nov., 1866, and left Scotland, he intended to abandon his Scotch domicile and settle in England. He had every reason after the discovery of his wife's infidelity to induce him to leave Scotland, all the ties which bound him to Scotland were broken, and his mother and all his surviving relations were settled in England. The fact that his income is derived from property situated in Scotland is immaterial, for it has never been suggested that domicile depends upon property. In *Manning* v. *Manning* (1) it was proved that the husband had not in fact abandoned his Irish domicile, and his evidence was disbelieved, but in this case the petitioner's evidence is uncontradicted, and there is no reason to discredit it. Most of the authorities are cases where the question of domicile for the purposes of succession has been raised, and where the Court has had to form a conclusion from ambiguous and inconsistent declarations and acts of a deceased person, but where the person whose domicile is in question has been examined and cross-examined, the only question is whether his evidence is to be believed.

As to the unreasonable delay, the petitioner's own evidence was very material to the question of the respondent's adultery, and the Evidence Further Amendment Act by which his evidence was for the first time made admissible was not passed until August, 1869. Further, it was proved that until a recent date his pecuniary affairs were much involved, and he was mainly dependent on his mother.

(1) Ante, p. 223.

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But he separated from his wife as soon as he discovered her guilt, and he has never since indicated the slightest intention of condoning it or of resuming cohabitation with her.

The following cases were cited on the question of domicile: *Bell* v. *Kennedy* (1); *Pitt* v. *Pitt* (2); *Yelverton* v. *Yelverton* (3); *Shaw* v. *Gould* (4); *Shaw* v. *Attorney-General* (5); *Munro* v. *Munro* (6); *Udny* v. *Udny* (7); *Dolphin* v. *Robins* (8); *Jopp* v. *Wood* (9); *In the goods of Raffenel* (10); *Dalhousie* v. *McDouall.* (11)

Cur. adv. vult.

THE JUDGE ORDINARY having reviewed the evidence as to the respondent's adultery, said that it left no doubt whatever on the mind of the Court that for a long time before the separation she had been carrying on adultery in a most degrading form, that is, not with a person of her own class and education, but with her husband's butler. Primâ facie, therefore, the husband had a right to come to any court that had jurisdiction to relieve him from such a wife.

[In reference to the counter charges of adultery against the petitioner, his Lordship said:—] The Court has next to consider the defence which has been made, and the way in which that defence has been conducted: and I must say that since I have sat in this court I have never seen a defence conducted in such a resolute and uncompromising manner. When the suit began the wife entered an appearance, but not under protest, although she had a point of jurisdiction well worthy of being raised. She entered an appearance generally; and then she wished to plead to the jurisdiction only. The effect of that would have been to hang up the suit for a long time. The opinion of this Court as to jurisdiction would have had to be taken in the first instance, and then probably there would have been an appeal to the House of Lords, so that the degrading facts of her misconduct would for a certain length of time, have been excluded from public observation.

(1) Law Rep. 1 Sc. Ap. 307.
(2) 4 Macq. 627.
(3) 1 Sw. & Tr. 574; 29 L. J. (P. M. & A.) 34.
(4) Law Rep. 3 H. L. 55.
(5) Ante, p. 156.
(6) 7 Cl. & Fin. 842, 871.
(7) Law Rep. 1 Sc. Ap. 441.
(8) 7 H. L. C. 390.
(9) 34 Beav. 88.; 34 L. J. (Ch.) 211.
(10) 3 Sw. & Tr. 49.
(11) 7 Cl. & Fin. 817.

The Court held, that according to the rules and practice of this Court she could not take that course, that she had let the time go by, and she must therefore plead to the merits, although it was open to her afterwards to raise at the hearing the point of jurisdiction also. Accordingly so she did, but not until she had availed herself of the right which everybody has, of appealing to the full Court which affirmed the decision of the Court of first instance. In the meantime, the co-respondent appeared, and as I see, by the same proctor, but he appeared under protest. He was therefore in a position to raise this question of jurisdiction before the merits were tried, and under cover of his name (for the Court can hardly believe but that it was Mrs. Wilson who was really fighting), a vigorous attempt was made to prevent the Court from getting at the merits, and it was said, "Why, this man at least has a right to raise the question of jurisdiction simpliciter, and it would be very improper to try the merits as against him before the question of jurisdiction is disposed of." There was an act on petition filed accordingly by him disputing the jurisdiction, but the petitioner then said, "Well, I have no desire to make this man a party to this suit. I only make him so in obedience to the Act of Parliament. I am quite willing, if the Court says it has no jurisdiction over him, to dismiss him from the suit;" and accordingly the petitioner proposed to do so; but the butler strongly objected to being dismissed, and he said he must go on and fight the question of jurisdiction which, after all, if he succeeded, could only end in his being dismissed. Thereupon the Court held that inasmuch as he applied to be dismissed in the suit on his own petition, and inasmuch as the petitioner was willing to dismiss him, he could not refuse to be dismissed. Waiving all question of jurisdiction and no longer insisting on his right to bring him here before the Court, the petitioner said, "I will consent to dismiss him as a party to the suit, and pay all his costs if he has incurred any," and he was dismissed accordingly.

These steps, therefore, which certainly were steps of a very vigorous and uncompromising defence, did not avail to prevent the merits of the case being tried.

And now I come to the course taken by Mrs. Wilson, when those merits were about to be tried. Without any ground for suspecting

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her husband of adultery, without any intimation from anybody, so far as the evidence goes, that he had been in the habit of leading a loose life, with nothing to point to the facts which are afterwards set up as establishing her husband's culpability, she appears to have set to work by means of a detective officer, a Mr. McKelvie, who, by the way, was not called as a witness to explain his proceedings or motives, to scour the brothels and low houses of Glasgow, which was the nearest large town to the place where they lived, to see whether some prostitutes could be found who would say that seven years ago they could prove that Mr. Wilson had been in the habit of frequenting those bad houses and committing adultery with them. Accordingly the result of Mr. McKelvie's active operations was that a string of, I really do not know how many, adulteries was charged against this gentleman. If adultery is established, of course, the wife is entitled to the benefit of it; but when adultery is charged under such circumstances, with so obvious a motive, and when it is attempted to be proved by those who have shewn by their conduct in the case what a vigorous and determined fight they were prepared to make, of course the Court must look upon such evidence with great care, and be perfectly well satisfied that the witnesses intend to tell the truth, and intending to tell the truth, that their memory accurately serves them. Apply those tests to the evidence given by these women, and I confess it wholly fails to satisfy my mind.

[His Lordship referred to the evidence by which the counter charge of adultery had been supported, and afterwards, in dealing with the question of costs, added:—] I desire to say on this occasion, and I hope it may be understood in future cases, that I will never make a husband pay for such a defence if it fails—I am confining my remarks entirely to the counter charge of adultery—got up by such means. The costs of a defence of that nature must never, I think, be included in the costs payable by the husband, unless it should turn out to be successful. When a husband has taken his wife in adultery, or has fair ground of complaint against her, and institutes a suit for a divorce, the Court will never allow her to set detectives to work at his expense without anything to indicate that he has been to blame, and without any clue which it might be desirable to follow out, without any circumstance what-

ever existing to justify an inquiry, except the desire of the wife to find out something which shall deprive him of his right to a decree. Therefore, although the respondent is entitled to her costs to the extent of the money paid into court, there will be a direction to the registrar not to allow any of the costs relating to the counter charge of adultery.

[His Lordship next referred to the evidence bearing upon the issue of the petitioner's cruelty, and came to the conclusion that it did not establish the charge.]

[Upon the question of unreasonable delay, his Lordship said :—] With regard to the delay, I think the husband gives a sufficient answer. He says, "First of all my pecuniary circumstances were embarrassed, that is one reason. But another reason is that until the law was altered enabling me to get into the witness-box and to depose to the occurrence of the 14th of October, when I found Howell locked up in my wife's bedroom, I had nothing to go upon but the evidence of servants;" and looking to the very extraordinary and unusual species of intercourse—I mean the intercourse between a lady and her butler—which forms the subject of inquiry in this case, I can quite understand he might be unwilling to rely solely upon the evidence of what servants may have seen to establish an adultery in itself so improbable. Therefore I think the objection on the ground of delay falls to the ground.

[His Lordship then proceeded to the remaining question raised by the respondent, whether the Court had jurisdiction to entertain the suit :—] The respondent is quite entitled to raise the question now that all the facts are before the Court, and the Court ought to be perfectly satisfied that it has jurisdiction before it proceeds to make a decree. The grounds upon which it is said the Court has no jurisdiction are, that the parties were married in Scotland, and lived in Scotland, and the adultery took place in Scotland, but what I think is mainly relied upon is that they were domiciled in Scotland at the time the suit commenced.

Now, it is not disputed that if the petitioner was domiciled in England at the time the suit was commenced this Court has jurisdiction, but whether any residence in this country short of domicile, using that word in its ordinary sense, will give the Court jurisdic-

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tion over parties whose domicile is elsewhere, is a question upon which the authorities are not consistent.

It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country, and strangers in another. It is not possible, however, to avoid to some extent collision with the Courts of different countries, because if the Courts of every country adhered to domicile as the rule of jurisdiction, there would still remain the fact of domicile to be established; and as all countries do not adopt the same rules of evidence, the evidence on this question might be very different in one country to what it might be in another. And this is what has happened, I believe, in this very case. It is not regularly before me, but I am told that the Court of Scotland has decided that the petitioner never acquired an English domicile, and that this conclusion was arrived at without his being called as a witness, which in Scotland could not legally be done. But in this court the petitioner was called as a witness, and swore to his own residence in this country, and to the intention with which he left Scotland to reside here. (1)

It is not, however, necessary for me to decide on this occasion whether mere residence, short of domicile in this country, is sufficient to found the jurisdiction of this Court, because I have arrived

(1) On the 22nd of May, 1872, Mrs. Wilson instituted a suit for divorce on the ground of adultery against Mr. Wilson, in the Scotch court. Mr. Wilson pleaded to the jurisdiction, alleging the same grounds as those alleged by him in the English suit in support of the English jurisdiction. The Scotch Court having examined the witnesses on both sides, overruled the plea to the jurisdiction. The petitioner, however, was not examined, the evidence of the parties being inadmissible.

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at the conclusion that the petitioner was at the commencement of this suit domiciled in this country.

I adopt the language of Lord Westbury in the case of *Udny* v. *Udny* (1): "Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case, so soon as the change of purpose or animus manendi can be inferred, the fact of domicile is established." Now that being, I think, a very able exposition of the state of circumstances that would support the legal conclusion of a domicile of choice, the question is, whether in this case there are circumstances from which the Court can properly infer that Mr. Wilson had made that choice. Most of the cases of domicile occur after the death of the party, and the Court has therefore to infer from the character of the residence in a particular country to which he has removed himself, from the ties that he has created for himself, from the property that he has acquired, the obligations that he has entered into in connection with the new country. The Court has to determine the fact that he has really *chosen* to reside there, as Lord Westbury puts it, "for an indefinite period as his home;" and if this were a case in which Mr. Wilson were dead, and the Court had nothing to go upon but the fact of his residence here, and the way in which it arose, I do not think there would be enough to enable the Court to come to the conclusion that he had taken up his domicile in this country. The facts are, that having been born in Scotland, certainly of Scotch parents, and therefore a domiciled Scotchman originally, and having passed a part of his early life in Scotland and part in England, yet he never had any

(1) Law Rep. 1 Sc. Ap. at p. 458.

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home of his own there until the time of his marriage. His parents lived there, but before his marriage his father had died, and before the separation his mother had removed from Scotland permanently, as she tells us herself, and entirely. She had separated herself altogether from Scotland, and taken up her abode in England. The petitioner had upon his marriage hired, for he never bought, first Almond Bank and then the house at Drylaw, which were his permanent residences in Scotland; and he had in addition a shooting place called the Ptarmigan. But as soon as this adultery happened he immediately put an end to his holding at Drylaw. He sold part of his furniture, and put the rest aside, warehoused it, and came to England, and has lived ever since in England with his mother, and he swore that he had never any intention of going back to Scotland as a country in which he meant to reside. He was not a man of any landed property or position in Scotland, and he had, as far as I can learn, no relations living in Scotland. His mother lived in England, and to her he came. It is true he was partner in a business which was carried on in Scotland, but he was essentially a sleeping partner in that business, as from first to last he had not taken any part in the active management of it, and, in fact, knew nothing about the details. He was not capable of doing so if he had wished—there is no doubt about that. Therefore he had no business connection with Scotland beyond drawing from works established there a certain income. He comes to England and resides with his mother, never intending, as he swears, to go back to live in Scotland.

It seems to me that the question which the Court has to ask itself is this: assuming that the mere circumstances attending the residence in England, if the man were dead, and we knew nothing of his intentions, except what we could gather from that residence, would not be sufficient to enable the Court to arrive at the conclusion that he had adopted an English domicile, still when we have the man here, and when he swears that that was his intention, why should not the Court believe him?

The Court must not take his word as conclusive proof of the fact, and if there are circumstances in the case which tend to shew that what he says is not true or likely to be true, they may influence the conclusion at which the Court would arrive. Therefore

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the question is here not so much whether the circumstances of his English residence tend to prove English domicile as whether, the man swearing to his intention to create an English domicile, there are such circumstances on the other side as warrant the Court in throwing over his oath and disbelieving him. I am not aware that there are any such circumstances. First, as regards the business, that really could not connect him with Scotland as to residence. Then a great deal was said about Ptarmigan Lodge. But the history of it was, that he had got a lease from the Duke of Athol, and laid out about £300 or £400 in building this little shooting lodge. The lease expires next year; but it is quite true that after he had ceased to cohabit with his wife, and after she had disgraced him in Scotland and he had come to England, he desired to prolong that lease. It is also true that in his letters he spoke of his desire to get back to Ptarmigan. But what for? Not because he meant to permanently reside there. He never had done so from the first; he used it during the autumn time when there was shooting going on, and in the summer, in the fine weather, when there was fishing to be had, but he had never used it as a permanent residence, for he was residing at Drylaw. I see no reason whatever, merely because he wished to continue the enjoyment of a Scotch shooting lodge, to doubt his word, that consistently with that he intended to have his permanent residence in England. Then the fact of his being a member of a club in Glasgow was relied on. It is quite true that on the occasion of his subscription falling due he wrote to his partner, and begged him to pay it, saying that he did not wish to disassociate himself entirely from Glasgow, because he would want to see his partner at different times, and would wish to have the facility when he went there, as he did occasionally, of sleeping and dining at the club. But the Court must remember that a subscription to a club is not a permanent thing, but a thing that may be dropped at any moment. Then great stress was laid upon one of his letters where he is talking of getting back to Ptarmigan, and speaking of "the land of his fathers"; but I think that is nothing more than an expression. He was only alluding to Scotland, as the place where he was born, and I cannot see that it indicates any intention to reside there. I may point out that if he really had been coming

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to England merely to obtain a colourable residence for the purpose of bringing this suit, if that were the sort of circuitous plot that he had entered into, he would hardly have written letters in the terms he did. Not only so, but he came to reside here at a time when the law of evidence was not altered, and when he had no reason to suppose it would be altered, and therefore when he would not have had any more chance of success in this country than in Scotland. I must repudiate that as not a fair charge against him.

If the Court sees no reason—and I see none—to doubt this gentleman's word, why should it not believe him? Well, I do believe him, and I believe that he came to England with the intention of permanently giving up his connection with Scotland, and fixing upon England as his fixed place of abode and home. Is there any question that that constitutes domicile? I apprehend not; but if authority were wanted, it would be found in the judgment of Lord Westbury in *Bell* v. *Kennedy*. (1) "We know very well," he says, "that succession and distribution depend upon the law of domicile. Domicile, therefore, is an idea of law. It is the relation which the law creates between an individual and a particular locality or country. To every adult person the law ascribes a domicile, and that domicile remains his fixed attribute until a new and different attribute usurps its place. Now this case was argued at the bar on the footing that as soon as Mr. Bell left Jamaica he had a settled and fixed intention of taking up his residence in Scotland. And if, indeed, that had been ascertained as a fact, then you would have had the animus of the party clearly demonstrated, and the factum which alone would remain to be proved would in fact be proved, or at least would result immediately upon his arrival in Scotland. So that, according to Lord Westbury's view, the true inquiry is, "Had he this settled purpose when he left Jamaica?" According to his view, therefore, if a man leave the country in which he is domiciled with the settled view and intention of taking up his permanent abode in another country, and arrives in that country and commences to take up that abode, that constitutes a change of domicile. This gentleman has done a great deal more than that; he has resided with

(1) Law Rep. 1 Sc. Ap. at p. 320.

his mother in England for years; and although it is quite true that being in bad pecuniary circumstances, he did not evidence his permanent intention by purchasing any house or taking a house on a long lease, or permanently connecting himself by obligations of any sort or kind with this country in a way which sometimes happens in other cases, he still did all that, supposing his story to be true, might be expected of him. I think the Court in every case must look at the species of evidence it would expect to obtain consistently with the circumstances of the man; and looking at the circumstances of this petitioner, the Court could not expect to find him buying a home or land, or hiring a house on a long lease, or taking any of those steps which in other cases have been held to constitute strong evidence as to change of domicile. Change of domicile is to be inferred, as it seems to me, from the man's own oath, coupled with the circumstance that there is not sufficient evidence to induce the Court to disbelieve it. Under these circumstances, I think the domicile is established, and the Court has jurisdiction; and that being so, the Court pronounces a decree nisi.

Solicitors for petitioner: *Newman, Dale, & Stretton.*
Proctor for respondent: *E. W. Crosse.*

SYMONDS *v.* SYMONDS AND HARRISON. *July* 27.

Dissolution of Marriage—Respondent in Contempt for removing her Child—22 & 23 Vict. c. 61, s. 5—Alteration of Settlement for the collateral Purpose of enforcing an Order of the Court.

After a decree nisi had been made on the prayer of the husband for a dissolution of his marriage, the respondent, under cover of an order of the Court for access to her child, took possession of it, and removed it beyond the jurisdiction of the Court:—

The Judge Ordinary refused to alter the settlement made on the marriage of the parties, so far as relates to the property settled on behalf of the respondent, in such a manner and for the express purpose to compel the respondent to submit to the authority of the Court, and to restore the child to the custody of the petitioner.

THE petitioner, Thomas Powell Symonds, applied to the Court for a dissolution of his marriage with Anne Symonds, by reason of

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her adultery with Broadley Harrison. A decree nisi was made on the 22nd of July, 1871, and the decree was made absolute on the 30th of January, 1872. After the decree nisi had been made, the respondent, under cover of an order of the Court giving her access to her child, Caroline Elizabeth Symonds, contrived to obtain possession of it, and to remove it out of the custody of its father. In consequence thereof, on the 27th of October, 1871, the Judge Ordinary ordered an attachment to issue against her for contempt of Court; but such order has not been served upon her, inasmuch as she cannot be traced. The child, who was born on the 27th of November, 1865, and was the only issue of the marriage, has not been recovered. By a settlement executed on the 4th of June, 1852, on the marriage of the parties, a sum of 10,000*l.* was assigned on behalf of the petitioner to trustees on certain trusts therein mentioned, and an equal third part of two sums of 2500*l.* and 2400*l.* which had been appointed in favour of the respondent by the Rev. Peter Cotes and Caroline his wife, the father and mother of the respondent, subject to the life interest of the latter. The trusts in relation to this fund were that, during the joint lives of petitioner and respondent, the income arising therefrom should be paid to the respondent for her sole and separate use without power of anticipation, and that, on the death of the respondent in the lifetime of the petitioner, it should be paid to him, and on the death of the survivor it should be held, both principal and interest, for the child or children issue of the marriage, to be assigned or transferred to them, on or at such ages, day, or time, and with such provisions for their maintenance or advancement, with such limitations over between or among them, subject to such charges, upon such conditions, and under such restrictions, and generally in such manner for their benefit as the petitioner and respondent or the survivor of them should appoint, and in default of appointment to be assigned or transferred to such children, if sons, on attaining twenty-one years, and if daughters, on attaining that age or marrying, in equal shares absolutely. And in case there should be no child of the marriage who should attain a vested interest in the said third part of the sums of 2500*l.* and 2400*l.*, then the said part is to be held in trust for the respondent absolutely, or if she should die in the lifetime of the petitioner, subject only to the life interest

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of the petitioner therein, it is to be held on such trusts, to and for such intents and purposes, and with and subject to such powers, provisoes, and declarations as she may appoint, and in default of appointment for her next of kin in accordance with the provisions of the statute of distribution in case she had died unmarried and intestate. After the decree had been made absolute, the petitioner prayed the Court to vary the terms of the settlement, so far as relates to the sum of 10,000*l.* settled on his behalf by striking out the life interest of the respondent therein, and the powers and authorities which she might exercise in reference to it after the death of the petitioner, should she survive him, and by ordering that all powers and authorities, which by the settlement might during the joint lives of the petitioner and respondent have been exercised jointly by them, may be exercised hereafter by the petitioner alone, as if the respondent were dead; and as regards the other fund, the one-third part of the two sums of 2500*l.* and 2400*l.*, to order that until the respondent shall submit to the authority of the Court and deliver up the said child to the petitioner, or after his death to some other person to be appointed by the Court, the trustees shall pay the income thereof to the petitioner for his life, and after his death shall allow the same to accumulate, or apply the same as this Court may from time to time direct; and that if at any subsequent time the respondent shall disobey any order of this Court, in respect of the said child, or shall interfere, or attempt to interfere, or cause or induce any person to interfere or be a party to any interference, with the custody thereof, except under the express order of this Court, the trustees shall cease to pay the income of the said sum of money to the respondent, but shall allow the same to accumulate as above, or apply the same as this Court may from time to time direct, and further, that the interest of the child in the share of the said sums of 2500*l.* and 2400*l.* may at once be deemed, and be a vested interest therein.

The Rev. Digby Octavius Cotes, one of the trustees of the settlement, filed an answer to the petition to vary it, in which he stated that Mrs. Cotes, the mother, is still living, and that there is no income in the hands of the trustees payable to the separate use of the respondent; and, further, he submitted that no order should be made affecting the capital or income derived from the Cotes family.

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The registrar, to whom the petition was referred, reported that it would be sufficient if the Court ordered that the trusts of the settlement be varied by extinguishing the life interest of the respondent in the sum of 10,000*l.*, and by ordering the trustees to hold the same, and pay the income thereof as if the respondent were dead, without having exercised any power of appointment over the same.

Dr. Spinks, Q.C. (*Bayford* with him) moved the Court to vary the settlement as prayed. It had been found that a decree of sequestration is perfectly useless against a married woman if the trustees of her settlement are unwilling to obey it. There are no means of enforcing it. The 22 & 23 Vict. c. 61, s. 5, authorizes the Court to make orders for the application of the whole or a portion of the property settled for the benefit of the children or of their respective parents. The Court, therefore, has the power to make an order in the manner prayed, and will be anxious to do so in the present case.

Dr. Swabey, for Mr. Cotes, the trustee, submitted that the Court has no power to make the order. The object of 22 & 23 Vict. c. 61, s. 5, was not to compel a party to obey its decrees, but for a different purpose. At present there are no funds upon which an order can operate.

Cur. adv. vult.

July 27. THE JUDGE ORDINARY. There is no difficulty as to that part of the order prayed for which is to put an end to the wife's life interest in the husband's settled property. As to the other part of the application, which asks the Court to lay its hand on the wife's own property, not on the ground that after her adultery has been proved she ought to be stripped of that property, but that she has committed a contempt of and a fraud upon the Court by improperly obtaining possession of her child and taking it out of my jurisdiction, I think that such an order would not be a proper exercise of the powers of dealing with the wife's property conferred on the Court by the statute. Those powers were conferred solely for the purpose of compelling the surrender of such portion of her settled property as, having regard to all the circumstances of the case, the Court should think ought to be surrendered for the

benefit of the husband and children, not for a collateral purpose. I must decline, therefore, to concede that part of the application.

Dr. Swabey asked for the costs of the trustee.

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THE JUDGE ORDINARY. The trustee is virtually defending the interests of this woman who, having been guilty of contempt, is obliged to keep herself in the back ground. I shall make no order as to his costs.

Proctors for petitioner: *Clarkson, Son, & Greenwell.*
Attorneys for Mrs. Cotes: *Clarke, Woodcock, & Ryland.*

PEARSON *v.* PEARSON AND PEARSON.

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May 13.

Will—Execution—Acknowledgment of Signature—Attest and subscribe.

The deceased having called in A., who was an illiterate man, to his room, asked him to make his mark to a paper, which he did. A., at the deceased's desire, then fetched his wife, who was living in the house, and she also, at the deceased's request, placed her mark on the same paper. There was no evidence that the signature of the deceased was on the will at the time these marks were made, nor did the deceased in any way explain to the witnesses the nature of the document they signed:—

Held, that the execution was invalid.

GEORGE PEARSON, of Hockwold-cum-Wilton, Norfolk, gardener, died on the 31st of March, 1870. The plaintiff, George Thornton Pearson, propounded a will of the deceased, dated the 9th of October, 1865. The defendants, Ambrose Henry Pearson and Henry Pearson, pleaded that such will was not executed in accordance with the provisions of the statute 1 Vict. c. 26. The Court had been previously (on the 26th of July) applied to on motion to grant probate of the will, but had refused to do so, and required it should be propounded; and thereupon the defendants had been cited to see proceedings. The will was holograph, signed by the deceased, and had the word "witness," with the names of the witnesses, written by the deceased, opposite their marks.

Henry Whistler, one of the attesting witnesses, said: "I am a labourer. I was acquainted with George Pearson. I worked for him constantly. I remember, about five years ago, George Pearson had fits. I went to see him. He asked me to call in my wife.

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We lived under the same roof with him. I went and called my wife. George Pearson said: 'Are you a scholar?' I said: 'No.' He then said: 'Will you unlock that desk?' Deceased took a paper out of the desk, and said: 'If you cannot write, Harry, you will have to make a mark to this paper.' I made a cross. Pearson wrote on the paper. I cannot say he wrote his name on the paper before me. He said something about, 'This will have to go before a lawyer.' I cannot say the mark on this paper is mine. My wife was not in the room when I made my cross. Pearson did not say the paper was his will."

Susan Whistler, the other witness, said she was called by her husband. The deceased told her to put her mark on the paper, and she did so. On cross-examination, she said she heard the deceased ask her husband to take the paper out of the box. She was then in the passage.

April 20. *Dr. Tristram* appeared for the plaintiff.

G. Browne, for the defendants.

The cases referred to were: *In the Goods of James Thomson* (1); *Ilott* v. *Genge* (2); *Cooper* v. *Bockett* (3); *In the Goods of Holgate* (4); *Gwillim* v. *Gwillim* (5); *Beckett* v. *Howe*. (6)

Cur. adv. vult.

May 13. LORD PENZANCE. The question is, whether this will was duly executed. The evidence of the two attesting witnesses was very short, and I will read my note of it. Henry Whistler said: "The deceased was a gardener. He asked me to make my mark to a paper. I did so. He asked me if my wife was in. I said: 'Yes.' He said: 'Call her in.' I did so. She came. The testator told her to make her mark. She did so." The wife, Susan Whistler, said: "I was called in. I made a mark. My husband had made a mark before. I did not see him make a mark." There was a good deal of cross-examination; and it was contended that, as the wife was in the passage at the time the husband made his mark, it may be taken she was present at that time.

(1) 4 No. of Ca. 643.
(2) 3 Curt. 160; 4 Moo. P. C. 265.
(3) 4 Moo. P. C. 419.
(4) 1 Sw. & Tr. 261.
(5) 3 Sw. & Tr. 200; 29 L. J. (P. M. & A.) 31.
(6) Ante, p. 1.

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My decision does not turn on that point; but if I had to decide whether the two witnesses were present at the same time, I should incline to the negative. There is no proof that the testator's name was on the paper at the time of execution. The witnesses are illiterate people; they can neither read nor write. The testator said nothing to either of them before they made their marks. He did not say the paper was his will, or what it was, or anything at all about it. The Court took time to consider its decision in consequence of one or two cases referred to by Dr. Tristram, especially a case of *In the Goods of James Thomson.* (1) The authority upon which the Court has acted up to the present time is *Gwillim* v. *Gwillim* (2), in which Sir Cresswell Cresswell held, that where a testator produces a paper, and gives the witnesses to understand it is his will, it is not necessary to have direct evidence that his name was on the paper when he asked the witnesses to sign it; but the Court is at liberty to judge from all the circumstances of the case whether it was there at that time or not. That is the substance of what was decided in *Gwillim* v. *Gwillim.* (2) I have followed that case on two occasions: *In the Goods of Huckvale* (3), and *Beckett* v. *Howe.* (4) In the former, in which it was proved the deceased had asked the witnesses to sign her will, I said: "It seems to be an established principle that this Court may, independently of positive evidence, investigate the circumstances of the case, and form its own opinion whether the testator's name was on the will at the time of execution; and if it is satisfied it was so, the execution will be good." And in *Beckett* v. *Howe* (4) I said: "Provided the testator acknowledges the paper to be his will, and his signature is there at the time, that is sufficient." That is the way I have hitherto dealt with these cases; but in that cited (*In the Goods of Thomson* (1)), Sir H. Jenner Fust expressed himself thus: "The Court has held that an express acknowledgment is not necessary; that when a paper is produced by a testator to witnesses with his name signed thereto, and they have an opportunity of seeing his name, and they attest the same by subscribing the paper, they being present at the same time,

(1) 4 No. of Ca. 643.
(2) 3 Sw. & Tr. 200; 29 L. J. (P. M. & A.) 31.
(3) Law Rep. 1 P. & M. 375.
(4) Ante, p. 1.

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this is a sufficient acknowledgment of the signature by the testator, though the signature was not actually made in their presence, or expressly acknowledged." No doubt that is a direct decision, which goes much beyond the other cases I have referred to. If the paper has the testator's name on it at the time the parties put their signatures there, without any statement that it is a will, the execution is sufficient. On hearing that case cited, I thought it advisable to reserve my decision to enable me to review the other cases. In such review I have come upon *Ilott* v. *Genge* (1), in which Sir H. Jenner Fust repeats the same observation: "The production of a will by a testator, it having his name upon it, and a request to the witnesses to attest it, would be a sufficient acknowledgment of the signature under the present statute." In that case there was an appeal to the Privy Council; and their Lordships decided, that, even assuming the will had been signed by the deceased before the witnesses had been called in, the mere circumstance of calling in witnesses to sign without giving them any explanation of the instrument they are signing does not amount to the acknowledgment of his signature by a testator. As the case of *Ilott* v. *Genge* (1) was decided by the Court of Appeal, it must set aside any observations not in accordance with it made in *In the Goods of Thomson.* (2) In the case before me there is no proof that the name of the deceased was on the paper when the witnesses put their marks to it. All that is proved is, that the witnesses were called in, and told to make their marks, but no explanation was given to them of the document before them. I think that was not sufficient, and that the will was not duly executed.

The costs of both parties may be paid out of the deceased's estate.

Attorneys for plaintiff: *Pyke, Irving, & Pyke.*
Attorney for defendants: *W. R. Ripley.*

(1) 3 Curt. at p. 172. (2) 4 No. of Ca. 643.

IN THE GOODS OF BROWN. 1872

Administration limited to carry out a Suit in Chancery—Second Grant—Practice. *Feb.* 13.

A grant of administration in the goods of a deceased limited to carry on proceedings in Chancery having lawfully issued and being still in force, the Court will not revoke it in order that a general grant may be made to the party who in the first instance would have been entitled thereto. The proper course is to supplement the limited grant with a grant of administration of the rest of the goods of the deceased.

THOMAS BROWN, late of Hobart Town, Tasmania, died on the 25th of March, 1864; and on the 10th of December, 1866, Henry John Buckland, as curator of intestate's estates in Tasmania, was constituted sole personal representative of the deceased in that country. On the 20th of November, 1869, letters of administration of the effects of the deceased, limited to proceedings in the Court of Chancery in a suit of *Dunn* v. *Brown and Others,* and until a final decree were made in that cause were granted by this Court to James Alexander and Philip Vanderbyl, as the nominees of Henry John Buckland. On the 8th of July, 1871, the Master of the Rolls, in a cause entitled *Salmon* v. *Dunn,* made an order for the payment out of court to James Alexander and Philip Vanderbyl, as the attorneys of Henry John Buckland, of a sum of 15,000*l.* standing to the credit of the suit, on their obtaining complete administration to the estate of Thomas Brown. On the 16th of January, 1872, on an affidavit that the limited administration granted on the 20th of November, 1869, had ceased and expired, and that Mr. Buckland was still the sole personal representative of the deceased in Tasmania, administration of the whole personal estate of the deceased was granted under 20 & 21 Vict. c. 77, s. 73, to James Alexander and Philip Vanderbyl, as the attorneys, and for the use and benefit of Mr. Buckland, the curator of intestate's estates in Tasmania, and as such the sole person authorized by the Supreme Court of Tasmania to act as the legal personal representative of the deceased; and until he should cease to hold that office, or until he should apply for and obtain letters of administration to be granted to him. It was subse-

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quently ascertained that the limited administration granted on the 20th of November, 1869, had not ceased and expired.

Feb. 13. *Dr. Spinks, Q.C.*, moved the Court to annul the grant made on the 20th of November, 1869, and to order a full grant of administration of the effects of the deceased in England to issue to Messrs. Alexander and Vanderbyl, as the attorneys of Mr. Buckland, and for his use and benefit.

LORD PENZANCE. The deceased died domiciled in Tasmania. He appears to have left a will, but the executors have renounced, and by an order of the Supreme Court of Tasmania, Henry John Buckland, curator of intestates' estates, has become the personal representative of the estate and effects of the deceased. These facts, without more, would have entitled the applicants, as the authorized attorneys of Mr. Buckland, to obtain a general grant for his use and benefit, under the 73rd section of the Probate Act. But the applicants applied for and obtained a grant limited to the carrying on of a suit in Chancery. It now appears, by the affidavit of Mr. Hughes, sworn on the 10th of November, 1871, that on the 8th of July, 1871, the Master of the Rolls made an order in another suit in Chancery for payment out of court of the sum of 15,000*l.* to the applicants as attorneys of Mr. Buckland on obtaining complete administration to the estate and effects of the deceased. The applicants, therefore, desire to have the limited grant revoked, and a general grant substituted. But this would not be in accordance with the practice of the court. It is the practice, when a limited grant has been made, to supplement it by a cæterorum grant. The effect of these two grants taken together, if made to the same person, is precisely the same as that of a general grant would be. For he who has first a part, and then the rest, has in fact the whole. There is, therefore, no end to be attained by revoking the first grant; and as it was properly issued, and is in no way defective, there is no proper ground for rescinding it. A cæterorum grant will, therefore, issue to the applicants.

Attorneys: *Masterman & Hughes.*

IN THE GOODS OF GRIFFITH. 1872 March 15.

Inconsistent Wills—Appointment of Executor not revoked—Probate of both Wills.

2PD/62

A testator left two wills, containing different and inconsistent dispositions of his property. The first will appointed an executor, and the second did not revoke that appointment, and appointed no fresh executor, and contained no general words of revocation. With the consent of all parties probate of both wills, as together containing the last will of the deceased, was granted to the executor named in the first will.

THE deceased died on the 12th day of February, 1871, leaving the two following duly executed testamentary papers.

1.

"This is the last will and testament of me, George David Griffith, of Berry Hill, in the parish of Nevern, in the county of Pembroke. I give and devise all my real and personal estate to my brother-in-law, James Bowen, of Troedyraur, and Dorothea his wife, their heirs and assigns, for ever. I appoint the said James Bowen sole executor of this my will, as witness my hand this 31st day of January, 1857.

"G. D. Griffith."

"Witnessed by us and in the presence of each other,

"Jane Bowen,

"Caroline James."

2.

"This is the last will and testament of me, George David Griffith, late of Berllam, in the parish of Eglwyswrw, in the county of Pembroke. I give and devise to my niece Anna M., daughter of my late sister Easter, wife of Benjamin Evans, £1000, to my sister Dorothea, wife of James Bowen, of Troedyraur, £200, to my niece Mana £100, all the remainder to my niece Ellen. I hope Daniel will have something after me. I hope I shall be buried at Nevern, in the county of Pembroke. 15th June, 1857.

"G. D. Griffith,

"Daniel Mathias,

"Mana Davies."

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A caveat had been entered against proof of the will of the 31st of January, 1857, and it had been warned, and an appearance entered to the warning.

Searle, with the consent of all the parties interested under both the testamentary papers, moved for an order staying the contentious proceedings, and for a grant of probate of the two papers, as together containing the last will and testament of the deceased to James Bowen, the sole executor named in the first of the said papers. He cited *In the Goods of Leese.* (1)

THE COURT made the grant on the authority of the case cited.

Attorneys: *J. L. P. Eyre & Co.*

April 16

IN THE GOODS OF LAWS.

Practice—Examination respecting Testamentary Paper—20 & 21 *Vict. c.* 77, *s.* 26.

The examination of a person respecting his knowledge of testamentary papers under the 26th section of 20 & 21 Vict. c. 77, must be either in open court or on interrogatories.

WILLIAM LAWS, late of Prudhoe Castle, in the county of Northumberland, died on the 17th of August, 1853, leaving a will dated the 10th of June, 1850, whereof he appointed his son, Cuthbert Umfreville Laws, one of the executors. He had never proved it, but it remained in his possession. One of the daughters of the testator, who was also one of the legatees named in the will, was the wife of Henry Rogers. She had died, and Henry Rogers had taken out letters of administration to her estate and effects. Cuthbert Umfreville Laws had furnished a copy of the will to Henry Rogers, who had subpœnaed him to bring the will into the registry under the 23rd section of 21 & 22 Vict. c. 95; but the will had not been brought in, nor had any appearance been entered by Cuthbert Umfreville Laws.

Searle, on behalf of Henry Rogers, moved for an order under the 26th section of 20 & 21 Vict. c. 77, that the said Cuthbert

(1) 2 Sw. & Tr. 442.

Umfreville Laws should attend before the district registrar for the county of Northumberland, where he resided, to be examined respecting the will. 1872 IN THE GOODS OF LAWS.

LORD PENZANCE. The statute gives the Court no power to make the order in that form. You must take the usual order that he attend to be examined in open court, unless you are willing to examine him on interrogatories.

Solicitors: *Miller & Smith.*

LINDSAY *v.* LINDSAY. *April* 18.

Conditional Will.

A mariner's will commencing, "Instructions to be followed if I die at sea or abroad," held to be conditional.

DECLARATION: That John Lindsay, late of 20, Upper Stanhope Street, Liverpool, master mariner, deceased, who died on the 8th of August, 1871, at Dumfries, in Scotland, being of the age of twenty-one years and upwards, made his last will and testament when on a voyage some time between the 6th of August, 1870, and the 28th of March, 1871, and in the said will appointed no executor and named the plaintiff, his widow, universal legatee; that the whole of the contents of the said will is in the handwriting of the said testator, and was reduced into writing and signed by him some time between the said 6th of August, 1870, and the 28th of March, 1871, when the said testator was at sea; and that the said testator was at the time of the making of the said will of perfect sound mind, memory, and understanding.

The defendants, the next of kin of the deceased, pleaded, 1. That the paper writing without date, alleged by the plaintiff to be the last will and testament of John Lindsay, was not written and signed by the said deceased when on a voyage at sea. 2. That the said alleged will was conditional, and the events upon the occurrence of which it was to take effect never occurred.

The plaintiff, in her replication, took issue on the first and second pleas, and further alleged that the will had been re-

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published at sea. The defendants joined issue on this replication, and the cause was heard before Lord Penzance without a jury.

Dr. Tristram, for the plaintiff; *O'Malley, Q.C.*, and *Searle*, for the defendants.

The will propounded was as follows:—

"Instructions to be followed if I die at sea or abroad:—All my property, either money or valuables, or any money that may be due to me, or any money or other property that may belong to me as a right after death, I bestow on my wife, Franceschina Evelyn Cecily. This to be forwarded to my brother, David Lindsay, 86, Lodge Lane, Liverpool. All money that he may have belonging to me he will forward to her, or do as she requires with it, for my sake, and that he will also assist, help, and protect her as far as he may be able, for the sake of his said brother.

"JOHN LINDSAY."

The plaintiff and other witnesses were examined in support of the will. There was evidence that it had been originally made at sea, but no evidence that it was ever republished at sea. It was proved that the deceased died at Dumfries from the effects of an accident whilst he was there on a visit with his wife and some of his relatives.

THE COURT held that, assuming the will to have been made at sea, it was clearly conditional, for the heading governed the whole of the contents. The deceased not having died at sea or abroad, the events on the occurrence of which it was to take effect never occurred. It therefore pronounced against the will, but allowed the plaintiff her costs out of the estate.

Attorneys for plaintiff: *Walker & Martineau.*
Proctors for defendants: *Johnson & Coote.*

IN THE GOODS OF NICHOLLS. 1872

Administration to Married Woman—Evidence as to Survivorship of Husband—Presumption as to his Death after seven Years' Absence. *July 4.*

A married woman, whose husband was last heard of in 1853, died intestate in 1856. The Court refused to grant administration to her next of kin without citing the husband or his representatives.

JANE CHAMBER NICHOLLS, the deceased, was a married woman, whose husband was convicted of felony in October, 1845, and sentenced to seven years' penal servitude. He was last heard of in Australia in the year 1853. Mrs. Nicholls died on the 15th of July, 1856, intestate. She was entitled to two legacies, subject to the life interest of her mother, Jane Dear, who died on the 19th of August, 1864.

June 26. *Dr. Tristram,* on behalf of one of the brothers and next of kin of the intestate, moved for a grant of administration to her estate and effects, without citing her husband or his representatives. They would not be entitled to the grant unless they could prove affirmatively that the husband survived the wife: *Satterthwaite* v. *Powell* (1); *Underwood* v. *Wing* (2); *In the Goods of Wainwright* (3); *In the Goods of Ewart.* (4)

Cur. adv. vult.

July 4. LORD PENZANCE. It was contended that the next of kin of the wife would be entitled to a grant in this case unless it could be shewn by the representatives of the husband, if he be dead, that he survived the wife, and some cases were cited in which the question of the survivorship of husband and wife was discussed. But those were cases in which the husband and wife had perished by drowning, or some other disaster, about the same period, and it was not possible to know which of them survived the other. The mode in which this Court, and the Courts of equity deal with such a state of things is, to say that those whose claim is founded on the sur-

(1) 1 Curt. 705.
(2) 4 D. M. & G. 633; 24 L. J. (Ch.) 293.
(3) 1 Sw. & Tr. 257.
(4) 1 Sw. & Tr. 258.

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vivorship of either must prove it affirmatively. Thus, if the next of kin of the husband claim administration to the wife on the ground that he survived, they must produce evidence of the fact, and, conversely, if the next of kin of the wife claim the grant, they must shew that she survived. Those cases have no application to the present case. The date of the wife's death is known. It is not positively known whether the husband is dead now. All that is proved is that he was last heard of in a foreign country in the year 1853. Thereupon the applicant claims the benefit of the presumption of law that by the end of seven years after he was last heard of he was no longer alive. That would carry his death down to 1860. If the presumption is to operate he must, therefore, have survived his wife. This seems to me to be the common case of a married woman, whose husband is entitled to represent her if he be alive, and whose husband's representatives are entitled to represent her if he be dead, and if he survived her. In this case the wife's next of kin have failed to shew that she died a widow, and I think, therefore, the usual practice must be followed, and the husband, or his representatives, must be cited before the grant can be made as prayed.

Attorney: *Bell.*

July 25.

PARFITT *v.* LAWLESS.

Testamentary Suit—Plea, Undue Influence only—Confessor and Penitent—Burthen of Proof.

The plaintiff, a Roman Catholic priest, had resided with the testatrix and her husband many years as chaplain, and for a part of the time as confessor. He was confessor at the time the will in dispute was made. There was no evidence that the plaintiff had interfered in the making of such will, or that he had procured the gift of the residue to himself, or that he had brought such gift about by coercion or dominion exercised over the testatrix against her will, or by importunity not to be resisted. Moreover, it was not shewn that even in the common affairs of life, in business, or in anything else, the testatrix was under the plaintiff's control or dominion:—

Held, that there was no evidence to go to a jury on an issue of undue influence. Natural influence exerted by one who possesses it to obtain a benefit for himself is undue inter vivos, so that gifts and contracts inter vivos between certain parties will be set aside, unless the party benefited can shew affirmatively that the

other party could have formed a free and unfettered judgment in the matter; but such natural influence may be lawfully exercised to obtain a will or legacy. The rules, therefore, of courts of equity in relation to gifts inter vivos are not applicable to the making of wills.

THE plaintiff, Rev. Charles Parfitt, D.D., propounded the will of Jane Conolly, of Cottles, near Bath, in the county of Wilts, widow, bearing date the 16th of July, 1862. The defendant, Philip Lawless, pleaded originally that the will was not executed in accordance with the requirements of the statute 1 Vict. c. 26, that the deceased was not of sound mind at the time of execution, and that, as regards the residue, the will was obtained by undue influence of the plaintiff. Subsequently the two first pleas were withdrawn. Mrs. Conolly's husband, who died in 1850, was possessed of a considerable estate called the Cottles estate, valued at 63,000*l.*, and other property. He left a life interest in it to his widow, and on her decease he bequeathed it to his son (by a previous wife), Charles John Thomas Conolly, absolutely; but in case his son died in the lifetime of the widow without issue, then the estate was to become hers absolutely subject to an annuity for life of £2,500 to the son's widow. Charles John Thomas Conolly died a few days before Jane Conolly, leaving a widow but no issue. The property, exclusive of the interest under her husband's will, of which the deceased died possessed was of the value of £7000. The will propounded was divided into two parts: by the first she disposed of the property she then possessed, and gave the residue thereof to the plaintiff; and in the second she referred to her interest under her husband's will, and in case she should come into possession of the Cottles estate she charged it with annuities to the amount of £740, and subject to such charges bequeathed it to the plaintiff. The plaintiff is a priest of the Roman Catholic Church, and from the year 1848 until her death resided with the deceased and her husband as domestic chaplain; for a greater portion of the time he also acted as her confessor. The question at issue was tried before Lord Penzance and a special jury on the 20th and 21st December, 1871. The defendant, upon whom the burthen of proof lay, produced several witnesses, but the Court held he gave no evidence to go to the jury. With the leave of the Court his counsel then called the plaintiff and exa-

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mined and ultimately cross-examined him as a hostile witness, but the Court still held that no sufficient case of undue influence to go to a jury had been offered, and directed the jury to find a verdict for the plaintiff, which they did, and probate was granted of the will on formal proof of execution. On the 24th of January, 1872, before Lord Penzance, Mellor, and Brett, JJ., an application for a new trial was made on the ground of misdirection, and a rule nisi was ordered to issue, which came on for argument before Lord Penzance, Pigott, B., and Brett, J.

April 24, 25. *Denman, Q.C.*, *Dr. Spinks, Q.C.*, and *Bayford*, for the plaintiff, shewed cause against the rule. There was no evidence to go to the jury. It is true the parties stood in relation to one another of confessor and confessed, but the plaintiff was not the maker of the will; and although he knew in 1858 that he had been appointed executor he was not aware that he was made residuary legatee until after Mrs. Conolly's death. It is, however, contended on the other side that where the relationship of confessor and confessed has been established, even although the testator be admitted to have been of sound mind and capable of making a will, and that the confessor had no part in the transaction, he is still bound to produce evidence in contradiction of undue influence; that is, to prove a negative.

[BRETT, J. They mean to say that when once the relationship is shewn the burthen of proof is shifted.]

Even in such a case the party setting up the plea must prove it by affirmative evidence; and, further, that the influence was exercised in reference to the particular will propounded. The most important case on this point is *Boyse* v. *Rossborough* (1), in which it was laid down that to vitiate a will there must be coercion or fraud.

[LORD PENZANCE. The question here is, was there evidence to go to a jury? They say they established that the residuary legatee at the time of the execution of the will was the confessor of the testatrix, and that that fact, coupled with his position in the house, was enough to cast a burthen upon the plaintiff to disprove influence, which he did not do; therefore, there was some evidence for a jury.]

(1) 6 H. L. C. p. 2, at p. 47. 3 Jur. N.S. 373

Such a presumption was rebutted by the evidence of the plaintiff himself. The cases principally relied upon by the other side related to gifts inter vivos decided in the courts of equity; but, as regards wills, if there be capacity and a knowledge of business proved or admitted, and an expressed desire to do what was done, undue influence cannot be presumed from the mere position of the parties. It must be proved, and it must be an influence exercised in reference to the will itself.

[LORD PENZANCE. In *Boyse* v. *Rossborough* (1) undue influence is very carefully defined, and it is very doubtful whether the same meaning is attached to those words in the courts of equity. In testamentary cases it is always defined as coercion or fraud, but inter vivos no such definition is applied. Where parties hold positions in which one is more or less dependent upon the other, as tutor and pupil, guardian and ward, &c., the Courts of equity hold that the weaker party shall be protected; and they set aside his gifts if he had not proper advice independently of the other. It is assumed he may have been overreached; that is far short of being coerced.]

Not only overreached, but denuded of his property in his lifetime. The Courts of equity do not lay down a rule that the mere relationship is sufficient to invalidate the transaction, and that in no case a deed made between such parties shall be good. The case of *Boyse* v. *Rossborough* (1) is the more important, as it was a proceeding in a court of equity, which would have applied the principles it acts upon inter vivos if they had been applicable.

[LORD PENZANCE. In the cases before the Courts of equity there are only two parties before the Court, one of whom must have been guilty of the fraud or influence, if there be any. In a testamentary contest the legatee may have had nothing to do with the making or execution of the will.]

Take the case of a medical man, who has not seen the deceased for months, and the will is made by an independent attorney—the principles of Courts of equity would not be applicable. So again, as between a father and son, or two sisters of different ages, a Court of equity in many cases might set aside deeds; but it would

(1) 6 H. L. C. p. 2, at p. 47. 3 Jur. N.S. 973.

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be absurd to avoid a will for undue influence by reason only of the relationship of the parties.

[They cited *Standen* v. *Edwards* (1); *Mountain* v. *Bennet* (2); *Norton* v. *Relly* (3); *Dent* v. *Bennett* (4); *Huguenin* v. *Basely* (5); *Williams* v. *Goude and Bennet* (6); *Barry* v. *Butlin* (7); *Jones* v. *Godrich* (8); *Kelly* v. *Thewles* (9); *In re Metcalfe's Will* (10); *Nanney* v. *Williams* (11); *Waters* v. *Thorne* (12); *Ireland* v. *Rendall* (13); *Cleare and Forster* v. *Cleare* (14); *Atter* v. *Atkinson* (15); *Harrington* v. *Bowyer*. (16)]

Digby Seymour, Q.C., Ballantine, Serjt., and *Dr. Tristram*, for the defendant. If the relationship of confessor and penitent exist, and during its continuance a will is made in favour of the confessor, and these facts are proved, such proof will be sufficient to support a plea of undue influence; and it will be for the other side to disprove by evidence the natural presumption arising from such a state of circumstances.

[LORD PENZANCE. Do you contend that, if a next of kin gives evidence that a disposition has been made in favour of A. B., a confessor, and upon that the party propounding the will gives no evidence in disproof of undue influence, the judge ought to instruct the jury to return a verdict against the will?]

The first proposition depends on another, namely, that there is a certain class of cases in which, on the ground of public policy, the Court of Probate will follow the precedents of the Courts of equity in their dealings inter vivos, and more readily assume the existence of undue influence.

[PIGOTT, B. Does your proposition apply to any other person than a confessor?]

The second proposition does.

[BRETT, J. Does it extend to any spiritual adviser?]

(1) 1 Ves. Jun. 133.
(2) 1 Cox, C. C. 353.
(3) 2 Eden, 286.
(4) 4 My. & Cr. 269.
(5) 14 Ves. 273.
(6) 1 Hagg. Eccl. 577.
(7) 2 Moo. P. C. 48.
(8) 5 Moo. P. C. 16.
(9) 2 Ir. Ch. 510.
(10) 2 D. J. & S. 122; 33 L. J. (Ch.) 308.
(11) 22 Beav. 452.
(12) 22 Beav. 547.
(13) Law Rep. 1 P. & M. 194.
(14) Law Rep. 1 P. & M. 655.
(15) Law Rep. 1 P. & M. 665.
(16) Ante, p. 264.

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That depends upon the degree of influence he may exert.

[LORD PENZANCE. Do you confine it to spiritual influence alone?]

That is also a question of degree. If the Courts are watchful in transactions between guardian and ward, much more will they be so where the relationship is of a spiritual character. In *Boyse* v. *Rossborough* (1) the relationship was that of husband and wife; and although that relationship leads the Courts to be on their guard, it will not be to the same degree as in the other class, where the connection between the parties is of a fiduciary character, as between guardian and ward, physician and patient, or tutor and pupil. This class most nearly approximates to the present. In the case of *Boyse* v. *Rossborough* (1) it is admitted that moral terror may be created sufficient to deprive one of his free agency; how much more may spiritual terror do so? In that case, too, stress was laid upon the absence of near relations. Here the testatrix was surrounded by relations and friends, whom she treated with great affection; and under these circumstances the fact that the will is inofficious itself indicates that the plaintiff must have interfered with the natural wishes of the deceased. Moreover, knowing the extent of her property, he ought to have awakened her mind to the claims of her relations. There was, indeed, direct evidence of the control of the plaintiff in restricting the actions of the deceased towards her relations and those about her; and if so, there was some evidence to go to the jury.

[BRETT, J. In order that in such a case a fact shall be admissible as evidence it must be more consistent with the plea of undue influence than with any other hypothesis. It is not enough to shew that it is equally consistent with either.]

The question is, whether there was any evidence at all. It is immaterial what was its strength; that was for the jury. If there was any such that a reasonable man could take it into his mind and form a judgment upon it, it ought to have been laid before the jury. It is notorious that a Roman Catholic confessor claims the highest authority over the conscience and actions of the penitent, and such influence is progressive, and cannot be shewn at any particular moment. It is impossible to account for

(1) 6 H. L. C. p. 2.

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the plaintiff taking so large a share of the testatrix's property except on the suggestion of undue influence. The bequest shews a morbid feeling, and there can be no doubt who raised that state of mind. The plaintiff was the best person to explain the transaction, and he gave his evidence in an evasive way. Was not that a ground to leave the case to a jury?

[They referred to 2 Burge, Conflict of Laws, 487; *Hunter* v. *Atkins* (1); *Hoghton* v. *Hoghton* (2); *Von Stentz* v. *Comyn* (3); *Gore* v. *Gahagan* (4); *Ingram* v. *Wyatt* (5); *Panton* v. *Williams.* (6)]

Cur. adv. vult.

July 25. LORD PENZANCE. This rule was granted in order to consider a suggestion strongly pressed that the rules adopted in the Courts of equity in relation to gifts inter vivos ought to be applied to the making of wills. In equity persons standing in certain relations to one another—such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward—are subject to certain presumptions when transactions between them are brought in question; and if a gift or contract made in favour of him who holds the position of influence is impeached by him who is subject to that influence, the Courts of equity cast upon the former the burthen of proving that the transaction was fairly conducted as if between strangers; that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced overreached by him of more mature intelligence. Applying this view of the subject to the making of a will, it was contended in this case that it was enough to shew that a legatee fell within the class enumerated, and that, having done so, the onus was cast upon him of proving that his legacy was not obtained by undue influence. It would be an answer to this argument to say that this has never been, and is not the law in this or any other court regarding wills; and that, if this Court should presume to make a new law on the subject, it would establish one rule in regard to personalty, while another

(1) 3 My. & K. 113.
(2) 15 Beav. 278; 21 L. J. (Ch.) 482.
(3) 12 Ir. Eq. 622.
(4) Milw. Eccl. Ir. 217.
(5) 1 Hagg. Eccl. 384.
(6) 2 No. of Ca. Suppl. 21.

would remain the existing rule in regard to realty. "One point, however, is beyond dispute," said Lord Cranworth in *Boyse* v. *Rossborough* (1), "and that is, that where once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burthen of proving that it was executed under undue influence is on the party who alleges it. Undue influence cannot be presumed." But in truth the cases in equity apply to a wholly different state of things. In the first place, in those cases of gifts or contracts inter vivos there is a transaction in which the person benefited at least takes part, whether he unduly urges his influence or not; and in calling upon him to explain the part he took, and the circumstances that brought about the gift or obligation, the Court is plainly requiring of him an explanation within his knowledge. But in the case of a legacy under a will, the legatee may have, and in point of fact generally has, no part in or even knowledge of the act; and to cast upon him, on the bare proof of the legacy and his relation to the testator, the burthen of shewing how the thing came about, and under what influence or with what motives the legacy was made, or what advice the testator had, professional or otherwise, would be to cast a duty on him which in many, if not most cases, he could not possibly discharge. A more material distinction is this: the influence which is undue in the cases of gifts inter vivos is very different from that which is required to set aside a will. In the case of gifts or other transactions inter vivos it is considered by the Courts of equity that the natural influence which such relations as those in question involve, exerted by those who possess it to obtain a benefit for themselves, is an undue influence. Gifts or contracts brought about by it are, therefore, set aside unless the party benefited by it can shew affirmatively that the other party to the transaction was placed "in such a position as would enable him to form an absolutely free and unfettered judgment:" *Archer* v. *Hudson*. (2)

The law regarding wills is very different from this. The natural influence of the parent or guardian over the child, or the husband over the wife, or the attorney over the client, may lawfully be exerted to obtain a will or legacy, so long as the testator thoroughly un-

(1) 6 H. L. C. at p. 49. (2) 7 Beav. 551.

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derstands what he is doing, and is a free agent. There is nothing illegal in the parent or husband pressing his claims on a child or wife, and obtaining a recognition of those claims in a legacy, provided that that persuasion stop short of coercion, and that the volition of the testator, though biassed and impressed by the relation in which he stands to the legatee, is not overborne and subjected to the domination of another.

The influence which will set aside a will, says Mr. Justice Williams, "must amount to force and coercion destroying free agency; it must not be the influence of affection or attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; further, there must be proof that the act was obtained by this coercion; by importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear:" Williams' Executors, pt. 1, bk. 2, ch. 1, § 2. This difference, then, between the influence which is held to be undue in the case of transactions inter vivos, and that which is called undue in relation to a will or legacy is all-important when a question arises of making presumptions or adjusting the burthen of proof. For it may be reasonable enough to presume that a person who had obtained a gift or contract to his own advantage and the detriment of another by way of personal advice or persuasion has availed himself of the natural influence which his position gave him. And in casting upon him the burthen of exculpation, the law is only assuming that he has done so. But it is a very different thing to presume, without a particle of proof, that a person so situated has abused his position by the exercise of dominion or the assertion of adverse control.

For these reasons it seems to me that it would be improper and unjust to throw upon a man in the position of the plaintiff, without any proof that he had any hand whatever in the making of this will, the onus of proving negatively that he did not coerce the testatrix into devising the residue of her land to him. I say coerce, for this is the only matter involved in a plea of undue influence. Lord Cranworth appears in the case above cited to have regarded fraud as a species of undue influence. It is a mere question of terms; but by the rules of pleading established in this

court since December, 1865, fraud, which includes misrepresentation, is the subject of a separate plea, and undue influence as a term used in a plea in this court raises the question of coercion, and that only.

I now proceed to examine the evidence, upon the assumption that the defendant was bound to prove the issue he raised, and that it was necessary for him to establish affirmatively by such evidence as the jury could reasonably act upon, that the residuary clause of this will was obtained by the coercion of the plaintiff. And upon this assumption the question is, Whether the evidence which the defendant gave ought to have been submitted to the jury? The argument on this head betrayed, I think, some confusion as to the nature and limits of the question, whether there is in any case evidence for the jury. For instance, it was urged as each separate fact or piece of evidence came to be commented upon, that it was not for the Court but the jury to assign its due value to such fact or evidence. If this were so it would be unjustifiable for the judge in any case to withdraw the evidence, however slight, or even irrelevant, from the jury. For to ascertain that it is slight or irrelevant the judge must assign a meaning and a value to it, and this might not be the same value or meaning which it would bear in the eyes of the jury. I conceive, therefore, that in judging whether there is in any case evidence for a jury, the judge must weigh the evidence given, and must assign what he conceives to be the most favourable meaning which can reasonably be attributed to any ambiguous statements, and determine on the whole what tendency the evidence has to establish the issue.

Again, it was argued that there were certain facts in this case calculated to give rise to serious suspicions, and it seemed to be contended that any conclusions which might suggest themselves by way of suspicion merely, however vague, might properly, if the jury pleased to indulge in them, form the basis of a verdict; and consequently that if facts were proved calculated to generate such suspicions, enough had been done to make a case fit to go to the jury. If this proposition were correct, it would follow that the defendant had nothing more to do in a case like the present than to prove that the plaintiff was a Catholic priest, that he was the confessor of the testatrix, and that she had made him her residuary

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legatee. For, upon this basis of fact, suspicion freely indulged and directed by eloquent comment might easily build up the fabric of undue influence or even fraud. It is not intended to be said that he upon whom the burthen of proving an issue lies is bound to prove every fact or conclusion of fact upon which the issue depends. From every fact that is proved legitimate and reasonable inferences may, of course, be drawn, and all that is fairly deducible from the evidence is as much proved for the purpose of a primâ facie case as if it had been proved directly. I conceive, therefore, that in discussing whether there is in any case evidence to go to the jury, what the Court has to consider is this, whether, assuming the evidence to be true, and adding to the direct proof all such inferences of fact as in the exercise of a reasonable intelligence the jury would be warranted in drawing from it, there is sufficient to support the issue.

I have been thus far particular in endeavouring to draw the line between that which rests upon proof, and that which rests on suspicion only, because in this case I thought the defendant's argument wholly confounded them. The propositions which he was bound to give reasonable evidence to establish were these; that the plaintiff had interfered in the making of the will, that he had procured the gift of the residue to himself, and that he had brought this about not by persuasion and advice (for that would be perfectly legal), but by some coercion or dominion exercised over the testatrix against her will or by importunity so strong that it could not be resisted. I have looked through the evidence in vain to find reasonable proof of any one of these three propositions. As regards the making of the will the defendant took a most unusual course. For the sake of having the first and last word with the jury, he withdrew the pleas which would have put the plaintiff on proof of the will, and gave no evidence of its execution himself. The consequence was that the attorney, who received the instructions from the testatrix, who made the will, and who, it must be presumed, knew the circumstances under which it was made, and the reasons upon which the testatrix acted so far as she allowed them to be known, was not called as a witness; nor were the attesting witnesses, nor was their place supplied by any other evidence. The making of the will and everything connected with

it was left an absolute blank. Literally the only proof which was offered to shew that the plaintiff had anything to do with it consisted in the fact that he was in London about the time that the will bears date, that he and the testatrix were seen together at the house of a relation of his, and that they were also seen at the exhibition. Whether the plaintiff knew what the testatrix had done for him in the will, is a point to which much cross-examination and much argument was directed. He denied it, but admitted many things from which a doubt of his denial may be inferred. But in my mind this matter is immaterial. The fact of his knowing the contents of the will after it was made is some proof that he was in the testatrix's confidence, but it has no tendency, as it seems to me, to support the conclusion that he had himself interfered in the making of it.

It is at this point of proving the plaintiff's interference that the evidence wholly fails. But that I may not do the defendant any injustice, I will recapitulate the whole of what was proved on this head. The plaintiff was the confessor of the testatrix. He knew, from what she told him, that she probably had power over the disposition of the estate in case of her stepson's death before her, and advised her to consult a lawyer. She asked for the name of the Roman Catholic bishop's attorney, and he told her. This attorney was the person who afterwards in London made the will. She told the plaintiff at some time that she had made him her executor, and had given him full powers. He remonstrated against his being her sole executor, to which she replied, "You villain! whom else have I to trust?" The plaintiff admitted that he had heard that Mr. Cooper, also a Roman Catholic priest, was originally intended to be executor and residuary legatee, but that he (the plaintiff) had been put in his place. The testatrix mentioned to the plaintiff from time to time legacies that she wished paid, and the plaintiff made entry of them on a piece of paper in Greek characters, that they might not be read by any one about the house. Those legacies were not inserted in the will of 1868, which was made after two of them at least had been thus noted by the plaintiff. There is not a single fact in this enumeration, as it seems to me, which is not quite as consistent with the testatrix having told the plaintiff what she had done, after she had done it, as with

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the plaintiff having had any hand in doing it; and it would, I think, defy ingenuity to demonstrate that from any one of these facts a reasonable or logical conclusion could be drawn that the plaintiff had a hand in making the will.

But if the evidence fails thus signally to establish the first proposition, with what pretence of reason can it be held to support this much larger proposition, namely, that the plaintiff not only advised the residue to be left to himself, but forced this disposition upon the unwilling testatrix? And yet that is what the defendant has undertaken to prove. No amount of persuasion or advice, whether founded on feelings of regard or religious sentiment, would avail, according to the existing law, to set aside this will, so long as the free volition of the testatrix to accept or reject that advice was not invaded. And what, it must therefore be asked, is the proof that any attempt ever was made to control her free will? There was not a fact, a word, or an event proved which shewed that on any occasion the testatrix had subordinated her own will to that of the plaintiff. It was stated, indeed, that he managed her affairs for her; but even this was confined to the last three years of her life, many years after the date of the will, and at a time when her health had failed. But of evidence to shew that, in the common affairs of life, or in business, or anything else, she was under the plaintiff's dominion, there was an absolute and total dearth. The only fact that pointed to her having been ever controlled by anybody in anything was this, that when asked by Miss O'Rourke why she did not tell Mr. De Ruffière that she had power to devise the estate, she replied, "They won't let me." At this time she had consulted her attorney, Mr. English, and perhaps Mr. Ward, and she had been in communication also with her stepson, Mr. Conolly, for he spoke of what he expected she would do with the property; and for aught that is known she had consulted other persons; and yet these words, "They won't let me," were argued to establish the following chain of reasoning. Some one had told her not to tell Mr. De Ruffière; therefore the plaintiff was the person who had done so. She wished to tell Mr. De Ruffière; therefore the person who gave the advice controlled her. If he controlled her in this, he must have controlled her in all other things; therefore he controlled her in making a will; there-

fore he controlled her in leaving the residue to himself. Unless this reasoning is satisfactory, there is not only no evidence of this control, upon which everything turns; but there was hardly an attempt to establish it. The plaintiff had lived in the house with the testatrix for years, and any control of his over her, if it existed, must have been visible to servants or some of the numerous friends who visited at the house. The defendant himself and his wife were called as witnesses, and had been frequently visiting at the house; and yet no question was asked them on the subject. Miss Martin, a friend and visitor, was also called, but not a question was asked her upon it. The only other witness was Miss O'Rourke. She had lived a year with the testatrix in 1856, visited her again for weeks in 1860, again in 1862, and again in 1866; and even of her no questions were asked by the defendant's counsel as to any dominion exercised in anything, however serious or however trivial, by the plaintiff. But she was cross-examined upon it, and then she said the testatrix was a clever person, who had a pretty firm will of her own, and that she never saw anything which led her to believe that the plaintiff ever induced her to do anything which she did not wish to do of her own accord. No other visitor, friend, or servant was produced, and the case was actually closed without a question being put by the defendant's counsel to any witness as to the existence of a dominating influence on the part of the plaintiff over the testatrix, either in relation to her testamentary dispositions or anything else. Then in the last resort the defendant called the plaintiff himself, and was allowed to cross-examine him; and, strange as it may appear, no instances or occasions were put to the plaintiff on which he was alleged to have controlled the testatrix, and he was allowed to leave the witness-box without being challenged to admit any facts from which the habitual exercise of dominion might be inferred. Unless, therefore, it is just and right to conclude in all cases that a Roman Catholic priest, holding the position of confessor, must be held to possess and exert over those whom he confesses such a dominion as to extinguish their free will in the disposition of their property, there were no materials, in my opinion, from which such a conclusion could be drawn in the present case, and therefore no evidence for the jury.

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There remains one fact to be noticed. The testatrix is proved to have told her niece, Miss O'Rourke, that if she wished to leave money for the saying of masses, or other purposes of religion, she must not express her trusts in her will, but leave the money to her confessor, and tell him privately what she wished. This statement greatly strengthens the suspicion to which the general facts of the case are calculated to give rise, that this devise of the residue to the plaintiff was in reality accompanied by some secret trust for religious purposes. Whether there be such a trust in this case it is not for this Court to investigate. Whether the possibility of such trusts existing, and eluding the power of courts of justice to drag them to light, ought or ought not to induce the legislature to place any new restraints upon bequests or devises for ministers of religion it is not for this Court to suggest, still less to assert. But one thing is plain; if this testatrix really did intend her property to be applied for the saying of masses, or for charities or other religious objects, and confided in her confessor to see that her objects were attained, she was, in the making of this will, carrying out her own wishes; she was intent on achieving an end of her own for the ease of her own mind, and was obeying the impulses of her own religious faith, all of which is hardly consistent with the notion of her having acted under the dictation of another.

The rule will be discharged with costs.

[His Lordship further stated that Mr. Justice Brett concurred in this judgment entirely, both in reference to the law and as to the facts, and that Mr. Baron Pigott also concurred, but with hesitation. He regarded the whole case as full of suspicion and mystery. His doubts arose only as to the effect of the evidence, and he quite agreed in the directions it contains on the point of law.]

Rule discharged. (1)

Attorneys for plaintiff: *Norris & Son.*
Attorneys for defendant: *Mason & Withall.*

(1) See next case.

[In the Prerogative Court of Canterbury.]

June, 1850. ASHWELL *v.* LOMI. 1850 *June.*

Testamentary Suit—Undue Influence—Physician and Patient.

Although there is no rule of law which forbids a man to bequeath his property to his medical attendant, yet it is not a favourable circumstance for one in such a confidential position, with respect to a patient labouring under severe disease, to take a large benefit under such patient's will, more particularly if it be executed in secresy, and the whole transaction assumes the character of a clandestine proceeding. In such a case the onus will lie very heavily upon the party benefitted to maintain the validity of the will.

This was a cause of proving in solemn form of law the last will and testament, with a codicil thereto, of Eliza Lomi (wife of Mark Lomi, M.D.), of Carlton Villas, Maida Vale, Middlesex, dated respectively the 9th of October and the 4th of November, 1847, promoted by Samuel Ashwell, M.D., the sole executor named in the will, against Mark Lomi, the lawful husband of the deceased. The opposition was founded on charges of incapacity of the deceased, and of undue influence exercised over her by Dr. Ashwell.

The case was argued in June, 1850.

Dr. Addams and *Dr. Harding* appeared for Dr. Ashwell.
Dr. Bayford and *Dr. R. Phillimore*, for Dr. Lomi.

Cur. adv. vult.

August 3rd. Sir H. Jenner Fust. The deceased in this cause, Mrs. Eliza Lomi, died on the 7th of April, 1848, leaving considerable property, over which she had a power of disposition. The bulk of her property was derived from her two brothers, Messrs. George and Thomas Walker, who predeceased her. At the time of her death she had no relations, and but very few friends. The property of the deceased consisted, as far as the Court can collect, at the time of her marriage with Dr. Lomi, in 1828, of a sum of 1000*l.* in her own hands, and of 3000*l.* vested in her brother as trustee for her for certain purposes. By the settlement made at the marriage these two sums were to become, under the circumstances which have occurred (the death of Mrs. Lomi without issue) absolutely the property of Dr. Lomi. By the will of Mr. G. Walker, dated 1834, a sum of 120*l.* Long Annuities was bequeathed to the deceased, but was not expressed to be for her separate use; and by the will of Mr. T. Walker, who died in April, 1845, a very considerable addition was made to her property, amounting to about 22,000*l.*, and it was devised to her for her sole and separate use—in fact, it was placed entirely at her own disposal. The deceased appears to have made several testamentary dispositions of her property. The first bears date in the year 1831, and is in her own handwriting. By it she gives the whole property which she then possessed, or of which she might become possessed, to her husband. On the 15th of May, 1847, she executed another will, by which she made a provision for two of her servants of the name of Blackwell, gave a legacy of 100 guineas to Sir C. Scudamore, her medical attendant, and the residue of her property to her husband. She appointed

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Sir C. Scudamore and Mr. King her executors. This will remained uncancelled and unaltered until October following. Upon the 7th of October another will was executed by the deceased, by which she made a somewhat different provision for her confidential servants, gave to her husband her English bank stock, which amounted to 2700*l.*, and also the Long Annuities; to Mr. Penny 5000*l.*; and appointed Dr. Ashwell, her then medical attendant, sole executor; but she did not dispose of the residue of her property. On the 9th of October, two days afterwards, she executed another will, for the purpose, it was suggested, of correcting and supplying that deficiency; and by it, after giving the same legacies as before, she appointed her executor, Dr. Ashwell, residuary legatee. On the 4th of November she executed a codicil by which the bequest of the English bank stock to her husband is revoked; and referring to the residue, she states her intention to be that, whatever its amount, it should pass under the residuary clause of her will of the 9th of October, 1847; so that by this instrument the interest of her husband under the will was considerably diminished, and that of Dr. Ashwell proportionately increased. The will of October, 1847, and the codicil of November, 1847, are the papers propounded in this cause by Dr. Ashwell as executor, and are opposed by Dr. Lomi, the husband of the deceased, and the residuary legatee in the will of the 15th of May, 1847. The question, therefore, to be determined is, whether the will of October, 1847, and the codicil of November, 1847, are proved to have emanated from a capable testatrix, freely and voluntarily acting. It is here to be observed that Dr. Ashwell, who takes an interest under these papers of at least 10,000*l.*, was the medical attendant of the testatrix, who had long been suffering under a very severe malady in a very aggravated form, and was much reduced as to her bodily state. Under these circumstances the onus lies upon him, and lies pretty heavily, to maintain the validity of these papers; for although there is no rule of law which says that no person may bequeath his or her property to a medical attendant, yet it is not a favourable circumstance, undoubtedly, for one in such a confidential position with respect to a patient labouring under severe disease, to take a large benefit, more particularly when the will is executed with secresy, and the whole transaction assumes the character of a clandestine proceeding. The case set up on behalf of the husband, in opposition to the will, is that the disorder under which the testatrix was suffering had produced, not only a very great effect upon her body, but that it had impaired her mental capacity; that such is the tendency of the disorder, that the remedies prescribed for her had also a tendency to becloud the faculties—to impair the mind even to a greater degree than the disease itself; that the testatrix was under the undue influence, control, and custody of Dr. Ashwell, and under a kind of duress; and that therefore she was not a free and voluntary agent in the transaction in question. On the other hand, it is alleged that, whatever may have been the tendency of the disorder, it was not such as was ascribed to it by the other side; that the deceased to the latest period of her life retained her mental faculties in a perfect state; that at no time during her whole life were there any symptoms of impaired mental faculties, or of that clouding of the mind alleged by Dr. Lomi; that the execution of the will and codicil were free and voluntary acts; that she knew and understood, not only the contents of the instruments she executed, but the effect they would have on her property; and that she desired, as she expressed herself, that Dr. Ashwell should have a handsome por-

tion for himself for the kindness and attention he had shewn her. Again, it was alleged by Dr. Lomi that he had always lived on terms of great affection with his wife from the time of their marriage until the year 1847. This was denied by Dr. Ashwell, who asserted that after 1834 they ceased to occupy the same bed, and had separate apartments, inferring that they had done so in consequence of the aversion and dislike which the deceased then entertained towards her husband. I have already said that in 1831 the deceased made a will by which she left all her property, if she had any separate property, to her husband. At that time, therefore, there is no reason to suppose there was any diminution of the mutual affection which led to their union. Again, in 1834, on the death of her brother, Mr. George Walker, she wrote a letter to her husband, who was then in Italy. That letter is now before the Court, and the whole style and tenor of it shews that she had a great affection for her husband. During the years from 1834 to 1842 Dr. and Mrs. Lomi resided with Mr. Thomas Walker another brother, who was dangerously ill, and who was attended by a Mr. Goodeve as a medical attendant; Mr. Goodeve speaks to the affectionate manner in which the deceased and Dr. Lomi lived during that period. Mrs. Lomi was devotedly attached to her brother, and required every one about her to render him assistance. Dr. Lomi co-operated readily and heartily with her, and she was sensible of it. She frequently expressed herself to Mr. Goodeve in terms of grateful satisfaction of Dr. Lomi's conduct towards her brother. There is one other fact in Mr. Goodeve's evidence I may refer to, namely, that at this time Mrs. Lomi was suffering from a painful disorder which would have rendered the occupation of the same bed with her husband, if not impossible, at least highly improper. Mr. Goodeve's evidence is corroborated by Mr. Brooke Smith, a solicitor employed by Mr. Thomas Walker, and on the whole I am satisfied that up to 1845, although the parties occupied separate beds and separate apartments, the strongest degree of affection subsisted between them. It is, however, true that in 1845, after the death of Mr. Thomas Walker, there was a coolness, and, perhaps, something more, between Dr. and Mrs. Lomi. Mrs. Lomi was then at Brighton, and Dr. Lomi in Italy, where he remained until March, 1846. It is proved by witnesses that Mrs. Lomi did express herself in strong terms as to the absence of her husband. She contended that he went abroad, and was staying away to avoid the execution of some deeds by which the property which had come to her from her brothers was to be secured to her for her separate use. If she had then made a will to his prejudice it would not have been inconsistent with the state of her feeling towards him. On the return of Dr. Lomi from Italy the deeds were executed, and I do not believe that Dr. Lomi absented himself for the purpose suggested. The deeds having been executed, Mrs. Lomi said that as he had complied with her wishes she would make a provision for him, but not to give him the whole of her property to be spent abroad. Here, then, I say is evidence of reconciliation between the parties. They lived together in the same house, although occupying separate apartments, as they had done before, and continued to live on terms which shew that there was no real estrangement between them. In 1844 Mrs. Lomi was attended by Dr. Wallis, a physician at Bristol, for the same malady for which Mr. Goodeve had attended her, and he continued to attend her until January, 1847. He was succeeded by Sir Charles Scudamore. Both these gentlemen speak to the regard and affection which subsisted between Dr. and Mrs. Lomi, the affectionate attend-

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ance of Dr. Lomi upon his wife, and his kindness to her, and her apparent gratification at the manner in which he conducted himself towards her. There were other witnesses produced to speak on this point, into the particulars of whose evidence it will not be necessary to go. It will be sufficient to say that in their opinion Dr. Lomi did everything that was right and proper towards his wife, and that she was grateful for his attention and conduct. Under these circumstances the disposition which she made of her property by the will of the 15th of May, 1847, was not improbable. On the 14th of May she had a violent return of her disorder, which caused her great alarm, as she thought she was going to die. She applied to Sir C. Scudamore to recommend to her a solicitor, and he named a Mr. King. By some error the letter addressed to him was delivered at the office of another solicitor of the same name. Mr. Comyn, the partner of this latter gentleman, who was absent at the time, attended upon Mrs. Lomi and took her instructions for a will. He says, "My inquiry as to the power whence she derived a right to make a will, being a married woman, led to the production of the settlement, which she had in bed with her, and put into my hands. I satisfied myself on that point by reference to it. As I recollect now, I read the material parts, or some of them, to her at the time. The instructions were very simple. She desired to make provision for her servants; the amount of that being settled, and she having mentioned her wish to leave a legacy of 100 guineas to Sir Charles Scudamore, I asked her if there were any other legacies that she desired to leave, and to whom she would give the residue. She replied that she had not another friend in the world, and that after what she had directed as to the servants and Sir Charles Scudamore all the rest was to be given to her husband. My impression from what she said of him was, that she was not living on the best of terms with her husband. I do not remember the particular expression she used in speaking of him. I do not mean that she made any direct complaint against him, or that she expressly said anything against him; it was rather that what she said led me to believe so. I inferred it was so. She did distinctly say that as she had not another relation or friend in the world, he, as her husband, was the most proper person to take the residue of her property." Now this will was executed, and remained uncancelled until October, 1847. It remained in the possession of the deceased until June, 1847, when it was sealed up and given to Sir Charles Scudamore, in whose custody it remained until the 11th of October. It is said it is very improbable that the deceased should have adhered to that will. I confess it does not appear to me that there is any great improbability, when I consider the circumstances in which the deceased was. Her two brothers were dead, and, so far as the Court can trace, she had no relation surviving; she had no intimate friends. The only person who at all at this time could have any claim upon her was Mr. Penny, to whom in the will propounded she gives 5000*l*. At this time she was scarcely acquainted, if at all, with Dr. Ashwell. I therefore consider there would have been nothing improbable in the deceased adhering to this will; for, looking at the terms on which Dr. and Mrs. Lomi then lived, there was no reason why the deceased should alter the disposition she had made in favour of her husband. According to the evidence of her servants, the Blackwells, the deceased's dissatisfaction with this will commenced very early, for even on the day on which it was executed, or on the day afterwards, she expressed her determination to make another will and provide for other persons. Nevertheless, she retained possession

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of the will until the beginning of June, that is, for a fortnight or three weeks after she had executed it, and then delivered it up sealed to Sir Charles Scudamore, the executor appointed therein. Now I confess it appears to me somewhat strange that the deceased should have expressed dissatisfaction with the will, and a determination to make another, and yet that no steps should have been taken for that purpose until the following October. If anything had happened to her in the interval Sir Charles Scudamore would have acted as executor, and her husband would have taken the whole of her property subject to the provision for the Blackwells, and the legacy to the executor. It does, to my mind, appear that she was not much dissatisfied with the provision she had made for her husband and servants, or she would have taken measures to alter the dispositions earlier than October. Dr. Ashwell was introduced to the deceased two days after this will was executed, namely, on the 17th of May, 1847. On that day he saw her, having been recommended by Sir Charles Scudamore. For some time the two gentlemen attended the deceased together, but afterwards Dr. Ashwell became the sole medical attendant. Sir Charles Scudamore left town for Buxton, having parted on good terms with the deceased. On his return he called upon the deceased, but she refused to admit him to the house, and he never saw her again. Dr. Ashwell became the sole medical attendant on the 4th of July, 1847, and attended the deceased very assiduously, undoubtedly, but I do not suppose more frequently than the nature of the disorder required. Mrs. Lomi apparently took a favourable view of Dr. Ashwell's skill and ability in the treatment of her disorder, and he became a great favourite. The conduct, however, of Mrs. Lomi towards her husband, and the sense she entertained of his attentions to her remained unchanged until the month of August following, when they removed to Carlton Villas, Maida Vale. Shortly after that there certainly did appear to have been a change of conduct and feeling towards him. Before that he went into her bedroom frequently—indeed, whenever he thought proper to do so. Those who saw them together in Clifford Street and Norland Square thought he was a kind and attentive husband. When they removed from Norland Square to Carlton Villas he carried her down-stairs to the carriage. There does not appear to have been any cause of offence given by Dr. Lomi; nevertheless, after they arrived at Carlton Villas, there was a diminution of confidence towards him. He was no longer suffered to have free access to his wife's room, but he was to go at certain fixed periods; and after some time (the exact date does not appear) the door of the room was locked, and access thereto was cut off, except with the consent of Mrs. Lomi and the Blackwells, who were in constant attendance upon her. Until the removal to Carlton Villas nothing had been done in reference to the alteration of the will of the 15th of May, 1847. Mrs. Blackwell deposes as to the commencement of the transaction as follows:—"About the 3rd of October I first heard the deceased speak to Dr. Ashwell about the will. I do not know what makes me remember the date, but I think it was about the 2nd or 3rd of October. The first time, she said to him in my presence and hearing that she was going to ask of him a great favour; that she was going to make a will, and she wished him to be executor, and that there was no one else in London she could ask. Dr. Ashwell told her that it was a serious thing for a physician, in full practice like him, to do, and that she must therefore allow him until the following day to think of it. I do not remember that she expressed any dissatisfaction with her then sub-

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sisting will, or that she said anything at all about it at that time. Then, the next day, after the medical inquiries had been answered, the deceased, in my presence and hearing, asked Dr. Ashwell if he would do what she had asked him the day before, and added, 'I mean you to be sole executor, which will be less trouble, sir.'" There is no allusion in this conversation to the point, whether, if appointed executor, he was to have the residue of the deceased's estate. "And Dr. Ashwell then said that he would on one condition, and that was, if she wrote the will herself." Now, if he was merely to be appointed executor, that was a precaution which was hardly necessary; but if he imagined that in being appointed executor, he should be entitled to the residue (which seems, from what subsequently occurred, to have been the notion of both deceased and himself), then one can easily understand the precaution taken, and not by any means improperly shewn. "And she said she was afraid she was too weak to do it; and he said that she might do a little one day and then a little another; and she agreed to do it. The same afternoon preparations were made for drawing up the will on the following day; the paper was ruled for her, and upon the 6th of October, I think, Mrs. Lomi proceeded to write a portion of the will down to two-thirds of the first side of the paper, finishing with the words 'two full suits of mourning.' The next day she finished it. I do not think she wrote the last words and 'residuary legatee' not until after it had been shewn to a lawyer, as I will presently depose. I do not recollect the deceased executed this paper in the presence of two witnesses. The names which appear subscribed thereto are the names of two shopkeepers. I only recollect their coming twice, once when they witnessed the will prepared by the lawyer, and the other when they witnessed the codicil." Blackwell confirms the evidence of his wife, and adds, that he got the witnesses to sign the paper at the request of Mrs. Lomi. It is quite clear, from the whole of the circumstances from the beginning to the end, that everything in reference to this will was to be done behind the back of Dr. Lomi. He was to know nothing at all of what was going forward, either of the desire of the deceased to make a new will, or even that her mind was floating in respect of the disposition of her property. He was kept in entire ignorance of what was being done. The witnesses were procured by Blackwell. The druggist, who was first mentioned as a respectable person, was objected to because Dr. Lomi was in the habit of going to his shop, and it was thereby possible, if not probable, that a disclosure would be made to him. There is no objection to be made to the witnesses called in, they were respectable persons, but were perfectly unacquainted with the deceased, although articles had been supplied from their shops to the house. They both declare that they had no suspicion that anything was going on which affected the interests of the husband; indeed, they did not know of his existence. Blackwell deposes that the testatrix told him to get the witnesses while Dr. Lomi was from home, because she did not wish him to know anything about her altering her will. Here is the first step in the clandestine proceedings. The witnesses, upon this as upon other occasions, were to be smuggled into the house during the absence of Dr. Lomi; his going out and coming in was to be watched to prevent his having a suspicion of what was going on. Neither of the witnesses knew the deceased, they had never seen her. They did not know the contents of the will, nor did they know she had a husband, to whose prejudice the will might possibly operate. They were called upon to attest the execution of a

will by a lady, who was in a languid state, but not, as far as they could see, in any other than a fit state to execute such a document. The will was accordingly executed in their presence on the 7th of October, and they attested it. At that time the dispositive part of the will appointed Dr. Ashwell executor, but not residuary legatee. Indeed, that did not appear necessary either to the mind of the deceased or to Dr. Ashwell, for they believed that as executor he would take the residue of the property. He was, however, directed by the deceased to shew the will to a solicitor, in order that the solicitor might see whether it would carry her intentions into effect. Dr. Ashwell consulted a solicitor named Matthews, with whom he had some acquaintance, having attended his family professionally. It is important that the communication between Dr. Ashwell and Mr. Matthews should be well looked at and considered, for it is upon his evidence and that of the Blackwells that the case depends. Mr. Matthews says, "I perused the will in his (Dr. Ashwell's) presence; and having done so, I told him that though it was a very informal document, I thought it would be operative, so far as it went, but that as no mention was made of the residue, whatever residue Mrs. Lomi possessed, was not disposed of; and whatever her intentions may have been, he (Dr. Ashwell) under the will, as it stood, would not take such residue. Dr. Ashwell had told me in the earlier part of the interview that Mrs. Lomi was in a very critical state, that she was the wife of Dr. Lomi, with whom she lived unhappily, and from whom, as regarded connubial intercourse, although they lived in the same house, she had been separated for a long period—I think he said some years. And in regard to the will, he explained to me that Mrs. Lomi had, in the first instance, asked him to be her executor, which he had hesitated to do, but that on being pressed, and after taking time to consider, he had assented; that, afterwards, upon her giving him the will, he had learned from her, to his great surprise, that under the will he was to take the residue of her property." According to this account, Dr. Ashwell had consented to act as executor before the deceased had expressed any intention that he should take the residue of her property. "Dr. Ashwell told me that Mrs. Lomi had full power under the will of her brother (to which will I afterwards referred at Doctors' Commons) to dispose of her property absolutely as an unmarried woman. On my telling Dr. Ashwell that the residue was undisposed of, he said that Mrs. Lomi understood that he would take the residue as executor. I told him that was not the law. He said Mrs. Lomi's intention was decided to give him the residue, and, acting upon that understanding, we proceeded to confer as to the mode in which the omission should be supplied, so that her wishes in that respect should be carried out. After some discussion it was arranged—very likely on my suggestion—that I should prepare a fresh will for her to the same effect as the will in her own handwriting then under discussion, but providing for the omission in regard to the residue. I told Dr. Ashwell that, for that purpose, I ought to see Mrs. Lomi, and take her instructions from herself; intimating to him, that although I had confidence in him, the fact of my preparing the will without previously seeing the testatrix might occasion him trouble hereafter." I cannot but think that Mr. Matthews would have more properly discharged his duty if, not relying on the positive assurance of Dr. Ashwell, he had insisted upon seeing the testatrix, and obtaining instructions from her, and not from Dr. Ashwell. "In reply to this suggestion of mine, Dr. Ashwell said she was so ill that the introduction of a

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solicitor, a stranger, would be very painful to her; and besides, that she was so watched by Dr. Lomi, her husband, that it would be attended with difficulty. He explained also that if any witnesses were necessary, it would be desirable they should be the same who had before witnessed the will, and who, he said, being resident in the neighbourhood, could be more easily introduced to her as opportunity offered." Here, then, is a disclosure to Mr. Matthews, by Dr. Ashwell, that this is to be a secret and clandestine business, that the will is to be executed in the presence of certain persons, because being tradesmen in the neighbourhood, it was more likely they could be introduced without observation. "I then told Dr. Ashwell that, under the circumstances, I would take Mrs. Lomi's will as instructions for preparing a new one, but that I must rely on his getting the words "residuary legatee" added to it in her handwriting to complete the instructions; and that so altered, it (the autograph will) should be lodged with me as my justification whenever I required it." Here, again, I must say that Mr. Matthews was thrown off his guard very much; he had merely the assurance of the person who was to take the residue; he acted without due caution; he suggested that the words should be added in her own handwriting. What influence Dr. Ashwell might have had over the deceased's mind at that time seems not to have impressed itself upon Mr. Matthews. "It was distinctly understood between Dr. Ashwell and myself that the will so to be prepared by me was not to be executed until Mrs. Lomi had, in her own handwriting, put in words constituting him her residuary legatee. Upon that understanding I then, in Dr. Ashwell's presence, prepared the new will. I made a draft first, and then copied it fair, and handed it to Dr. Ashwell, and he took it away with him, together with the original (the autograph) will. The new will so prepared by me was in substance the same, as to contents, as the autograph will, except in the addition of the residuary bequest. On reflecting" (it is a pity it did not occur to him earlier) "on the matter, after having given the will as just described to Dr. Ashwell, I felt so strongly the propriety of my seeing Mrs. Lomi in respect thereto, that I went late in the evening—I think about nine o'clock—of the same day, and called upon Dr. Ashwell to state my wish. He told me, however, that the will I had prepared was then with Mrs. Lomi, and that it was either executed, or would be that night; and he informed me that Mrs. Lomi had already inserted the words 'residuary legatee' in the original will. I am not positive as to the fact, but my present impression is, that he had the autograph will in his possession, and that he then shewed it to me with the words 'residuary legatee' added to it, as I afterwards saw it, and as it now appears. I well recollect that I came away from Dr. Ashwell's on this occasion satisfied that the words had been added. I have a floating impression on my mind that at the time I prepared Mrs. Lomi's will I thought it likely that there might be some settlement under which, in addition to her brother's will, her power of appointment over her property was derived, and I think I must have spoken to Dr. Ashwell on the subject. I did not, however, know or ascertain the fact to be so, and the will, therefore, contained no reference to any settlement." This will was executed by the deceased on the 9th of October, in the presence of the same witnesses who had attended on the 7th of October, and at an hour appointed when Dr. Lomi was likely to be, and was, in fact, absent, and without his knowledge. Of these circumstances Dr. Ashwell was fully aware, because, when Mr. Matthews proposed to see the deceased, Dr. Ashwell answered,

"Not only that the presence of a solicitor would be painful to her, but that she was so watched by Dr. Lomi, that it would be attended with some difficulty." Tradesmen in the neighbourhood, whose access to the house would be more easily accomplished than that of strangers, were selected as witnesses—Mr. Lane and Mr. Hough. They certainly do speak to the recovery of the deceased, at least in appearance, from the state they had seen her in on the 7th; she was more cheerful and entered more fully into conversation. Mr. Hough expressed a wish to know what instrument he was signing, because, he said, that on a former occasion he had got into difficulty from putting his name to a paper, the purport of which he did not understand. The deceased told him it was her will (she knew, therefore, that she was executing a will), and the witnesses accordingly attested the execution. They were, however, almost strangers, and even then did not know that such a person as Dr. Lomi existed. According to the evidence of the Blackwells, after the execution of the will Mrs. Lomi expressed her approbation of it, and said she felt happy that she had made such a disposition of her property, and hoped there would be something handsome for Dr. Ashwell in return for the trouble and attention he had bestowed on her. I conclude, therefore, that the will was executed by her with a knowledge of its contents, and of the disposition in favour of Dr. Ashwell. An accidental circumstance led to the alteration of this will by the execution of a codicil. A Mr. Savery, of Bristol, an attorney, employed by Mrs. Lomi in the year 1846 in reference to the settlement made in February of that year, in the month of October, 1847, sent in his bill of costs. "On the 30th of October," says Mr. Matthews, "Dr. Ashwell called on me and shewed me a bill of costs from Messrs. Savery & Co., which had been sent in to Mrs. Lomi. There was a reference in the bill to a settlement or settlements prepared for Mrs. Lomi, and Dr. Ashwell was anxious to know how far such settlements would affect the disposition Mrs. Lomi had made of her property. I suggested it was desirable to see the settlements. He said he did not desire to trouble Mrs. Lomi to make search for the papers, as she was so ill; but if I thought it essential that I should see the settlements he would try and get them." Now, these papers were, it seems, deposited at that time in a box under Mrs. Lomi's bed, and they were delivered to Dr. Ashwell. Mr. Matthews continues: "On the 3rd of November, Dr. Ashwell again called upon me; he brought with him attested copies of two deeds, to which Mrs. Lomi and her husband were parties, namely, a deed of settlement, and a deed of confirmation of the settlement. Dr. Ashwell told me that he had Mrs. Lomi's instructions that if anything was to be done to her will in consequence of these settlements, I was to do it. Having glanced over the settlements very cursorily, I suggested to him that it would be better to re-shape the will in reference to the powers in the settlement, and that it could be done by a codicil, and on Dr. Ashwell saying that Mrs. Lomi's state did not admit of delay, I arranged to call upon him that evening after I had prepared the proposed codicil. I did sketch out a codicil, and I called upon him as arranged. Whilst with him on this occasion I thought it better to read through the deeds carefully (I had only done it very cursorily before.) On doing so I discovered that Dr. Lomi would, under them, in consequence of there being no issue of the marriage, take 4000*l.* settled property, independently of any disposition she should make in his favour, and I told Dr. Ashwell so. He said he was quite sure Mrs. Lomi had no idea of that fact, but believed she had full power to dispose of the whole

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fund; and he expressed an opinion that Mrs. Lomi intended the English bank stock, which she had left by her will to Dr. Lomi, should be in lieu of the 4000*l.*, the value of the funds being about the same." I do not find that Mrs. Lomi had ever intimated such an intention, probably that was a conjecture of Dr. Ashwell. What the real value of the bank stock is I do not know, but it is somewhat strange that if such was the deceased's intention, she should not have communicated to Dr. Ashwell and Mr. Matthews the purport of the deeds, which had been so carefully explained to her by Mr. Savery before she left Bristol, and which were brought to her attention in May, 1847, when the will of that date was drawn up. "I told him that that being the case, the better plan would be to revoke the bequest to Dr. Lomi of the bank stock, but that for drawing a clause to that effect I must certainly have Mrs. Lomi's personal instructions. He represented the same difficulties as before in regard to my seeing her." It appears that from the time of deceased's removal to Carlton Villas no one had had an interview with her except the servants and nurses, and Dr. Lee, who was called in in consultation in November. "But he said that he thought he could get me one interview with her. I told him if her intentions were as he supposed, and he would explain the matter to her in the interval, I would prepare the codicil, and take it up to her on his informing me of her wish to that effect. He called upon me next morning, and told me that he had explained the matter to her, and that she was prepared to execute the codicil." So that the codicil was prepared on the assurance of Dr. Ashwell that he had explained the matter to the deceased, and she was prepared to execute it. "He informed me that he had made an appointment for that afternoon, because it was supposed that Dr. Lomi would then be away." Herein is the actual concurrence of Dr. Ashwell in a secret and clandestine execution of this instrument by a lady who at the time was in such a precarious state that the matter would admit of no delay. Mr. Matthews, at the time appointed, went to deceased's house, accompanied by his clerk Mr. Gee. "On arriving at the house we saw the servant Blackwell, who appeared to be aware of the object of our visit. Dr. Ashwell, I think, had said he would be so. (So here again Blackwell is made a party to the clandestine introduction of Mr. Matthews, for so I must call it.) He shewed us up to Mrs. Lomi's bedroom. We found her sitting up in bed, and evidently prepared to receive us. She looked very ill in health. I introduced myself and the subject of my visit by mentioning my name to her, and saying that I believed Dr. Ashwell had named my coming, or in some such general way. Then I stopped. I hesitated to go on because the female servant was in the room. Mrs. Lomi understood apparently my motive, for she immediately made a sign to the servant to leave the room, which she did, and I and Mr. Gee were left alone with her. I then entered with her upon the subject of my visit. I told her of the discovery I had made, that by her settlement Dr. Lomi, her husband, took 4000*l.* independently of any disposition in his favour, and that I understood that it was not her intention that he should take that sum and the bank stock too, and that the codicil I had brought with me had been accordingly framed to meet that. By her request I read the codicil to her; I read it very carefully and slowly, and she paid particular attention to it as I read. She said she had intended to give her husband the bank stock, but not in addition to the 4000*l.* I suggested to her that perhaps she would like to alter the codicil, and that if so, I would do so in accordance with her wishes. In fact, I was

anxious that she should propose to have it altered, it would have been a satisfaction to me and I should have preferred it, as in that case the instructions would have emanated directly from herself." Undoubtedly, and it would have been a satisfaction to the Court if Mrs. Lomi had given her directions immediately to Mr. Matthews and not through Dr. Ashwell, who was to derive so much benefit from its execution. "She said, however, she did not wish the codicil altered at all. She expressed her entire satisfaction with it, and stated she would rather have it executed as it was. I entered fully into explanation of the general and particular effect of the codicil, and more especially in reference to the disposition of the residue to Dr. Ashwell. I asked her if she fully understood that Dr. Ashwell would take for his own benefit the whole residue of her property, and whether she desired it should be so, and she said it was her wish, and she did not know any person that she should be so pleased to give it to, or made use of words to that effect. In the course of our conversation much was said by her in reference to her husband and the settlement, and the property he had thereby professed to settle upon her. She said it was a deception on his part; that he had, in fact, made no settlement, and that she had never received to the value of a needle-full of thread from him—that was her expression. That he had deceived her throughout, and that she had no intention to aggrandize him." Mr. Matthews then deposes to the execution of the codicil, and that the testatrix was of perfectly sound mind, memory, and understanding at the time. Such then is the account given by Mr. Matthews of the preparation of the testamentary instruments on which he was consulted, not by the deceased, but by Dr. Ashwell. The account which Dr. Ashwell gave to Mr. Matthews is confirmed in most respects by the evidence of the Blackwells. The preparation and execution of the codicil and the reading over and explanation of it to the deceased by Mr. Matthews, are distinctly spoken to by him and by Mr. Gee, his clerk. The effect, then, of this account is now to be considered. The evidence is that the first of these papers, that of the 7th of October, is in the handwriting of the deceased; that by it she did not continue to bequeath the residue of her property to her husband; that she made no disposition of the residue. As that paper is in her own handwriting, so far as it goes it must be taken that she executed it with a full knowledge of its effect, except as regards the legal point, whether by the appointment of a nude executor he would be entitled to take the residue of the property without actual disposition. I cannot therefore doubt that if the deceased were of sound mind that instrument must be held to contain her intentions. There is, then, the will of the 9th of October, founded upon the previous will, to which had been added, on the suggestion of Mr. Matthews, the residuary clause in the handwriting of Mrs. Lomi. Unless the deceased were at the time in a state of incapacity, I must hold that in executing that instrument she knew and understood the contents, and that the residue passed under it. We now come to the discovery that Dr. Lomi took 4000*l.* under the settlement, which led to Mr. Matthews being introduced to the deceased. That was undoubtedly a very fortunate circumstance for Dr. Ashwell, for as regards the execution of the wills of the 7th and 9th of October, I should have had considerable difficulty in pronouncing for the latter upon the testimony of the two subscribing witnesses, who knew nothing whatever of the deceased, of the contents of the will, or of the existence of Dr. Lomi at the time. However off his guard Mr. Matthews may have been, however incautious in the first instance

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with respect to the preparation of the will, he was more on his guard, more cautious, with respect to the execution of the codicil. He had an interview with the deceased, and he gives in his evidence a full explanation of all the circumstances attending that interview, which the Court must believe on his representation. He clearly states that the deceased was of full capacity to know and understand the contents of the instrument. It is true that as regards her bodily state she was in a very reduced state, but I do not find from the testimony of any of the witnesses that there was any appearance of imbecility of mind or incapacity. The argument of counsel on this head was principally founded on the nature and tendency of the disorder under which she suffered, and there was evidence to shew that the disorder has in some cases the effect of impairing the mind. There was evidence, especially that of Dr. Locock, that stimulants at the time he visited her would have been improper. He saw her in April, 1847, or in the beginning of the following month of May. Therefore, he could give an opinion only; nothing more than an opinion—as to what would be proper treatment in an after stage of the disorder; he could give no opinion as to her state of mind and faculties at the time the instruments were executed. No other medical man, except Sir Charles Scudamore and Dr. Lee, saw Mrs. Lomi after she left Bristol. Sir Charles saw her for the last time on the 4th of July. He considers the treatment followed by Dr. Ashwell was not proper. That is his notion; but even if that were so, and if the tendency of the disorder were to affect the mind, there must be proof not only of that tendency, but that the mind was in this particular case actually impaired before the Court could pay any attention to that. No person is produced to say any such thing. Dr. Lee, who saw the deceased on several occasions between the 29th of November, 1847, and the date of her death, not only concurs in the statement of Dr. Ashwell as to the propriety of the treatment, but he also states that on the occasions of his visits there was not the least appearance that the mind of Mrs. Lomi was affected; her faculties were in as good a state of vigour as they could possibly be. I cannot but think, upon such evidence as this, it is too much to say that the deceased's faculties were so impaired as to render her liable to influence, or incapable of understanding the contents of the instruments in question, one of which was drawn up in her own handwriting and the other explained to her. The evidence is that her mind was unimpaired, therefore the instruments executed under the circumstances I have stated must be considered as the testamentary disposition of a capable testatrix. It is true this lady was in a position to be taken advantage of. No person was permitted to see her but those who lived in the house, except her husband, the medical attendant, and the parties who were necessarily called in to witness the execution of the paper. Such execution was a transaction of a clandestine and secret nature, although possibly at the desire of the deceased. However, as Mr. Matthews at last did what he ought to have done at an earlier stage—saw the deceased and explained the circumstances as to Dr. Lomi's position, and as she fully understood and adopted the codicil prepared by the instructions of Dr. Ashwell, I think there is sufficient evidence to call upon the Court to pronounce for the validity of the will of the 9th of October and the codicil of the 4th of November. There remains the question of costs, and I was much pressed to condemn Dr. Lomi in them, in order to protect Dr. Ashwell from a prejudice which has been created against him, and the obloquy under which he has been labouring for some

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time as to the part he has taken in this transaction. There seems to be no foundation for the charge that Dr. Ashwell pursued the treatment he did, even if it were improper, with any view of reducing the deceased to such a state as to render it more easy to carry into effect the intention which it is suggested he entertained against the lady's property. Moreover, there is no foundation for a further charge of misappropriation of the deceased's property. Nevertheless, I must bear in mind the situation in which Dr. Lomi was placed. At the time of leaving Norland Square he was on terms of affectionate intercourse with his wife; and notwithstanding the evidence of the Blackwells, there seems, after the removal to Carlton Villas, to have been no cause given by him for the alteration of his wife's conduct towards him until the 9th of November, after the execution of the codicil, when Dr. Lomi conducted himself in a very strange manner. How any alteration was produced in respect of Mrs. Lomi's feelings towards her husband, the Court has no evidence whatever; but the fact is so. Dr. Lomi was excluded from access to his wife's room, except upon particular occasions, and he was kept in ignorance of everything going on as regards the transaction of the will, and the presents which were from time to time made to Dr. Ashwell. He was, therefore, placed under very peculiar disadvantages; he had no one (for no one was permitted to see the deceased except those I have mentioned) to supply him with information as to the real state and condition of the deceased. The principal persons who have been brought forward in this cause were acting in concert with Dr. Ashwell in concealing from Dr. Lomi the preparation of these testamentary papers. It is very true that communications were made by Dr. Lee and Dr. Ashwell to Dr. Lomi on the state of the deceased, and he knew that stimulants were administered to her; but whether he knew the full extent to which brandy was taken by her is not very clearly to be collected from the evidence. Be that as it may, Dr. Lomi was in an unfortunate position—not master in his own house. If he had attempted to eject either Charlotte Blackwell or her husband, he would in all probability have been ejected himself. Therefore I say that Dr. Lomi's situation must be taken into consideration. The Court has not to determine upon delicacy of conduct, whether Dr. Ashwell's conduct in the responsible position he stood towards this lady was becoming. It has to determine a question of law, and that it has decided in favour of Dr. Ashwell. But I cannot think it is a case in which Dr. Lomi can be accused of having maliciously brought forward these accusations against Dr. Ashwell, although they have not been established by evidence. Explanations have now been given of certain circumstances, but how could Dr. Lomi foresee that? He was kept in entire ignorance of all that was going on in his own house; his egress and ingress were watched, to enable the parties to smuggle in the witnesses to attest the execution of the will, by which his interests were so materially affected. He knew nothing at all about the circumstance until the morning after the death of the deceased, when it was communicated to him by Dr. Ashwell that a will had been executed. Whether even then Dr. Ashwell informed him of the circumstances under which the will had been prepared; whether he communicated to him that witnesses had been introduced into the house, after it had been ascertained that he was not at home; whether he were informed that, in the first instance, the chemist had been proposed as a witness, but that he had been rejected because Dr. Lomi was in the habit of going to his shop, and might have gained an inkling of what was going on, does not appear from the evidence; but bearing those facts in mind, and,

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further, that Dr. Lomi was excluded from his wife's room, whether by her desire or not, with the active concurrence of the Blackwells, and, as it appears, with the full knowledge of Dr. Ashwell, I cannot say that imputations have been cast by Dr. Lomi, with the knowledge that they were false and malicious. It is not a case in which the Court ought to condemn the defendant in costs. The will and codicil are made in favour of a person of whom the deceased knew nothing, perhaps not of his existence until he was called in to consult with Sir Charles Scudamore as to the condition of the deceased. There was, therefore, a period of five months which Dr. Ashwell had to make an intimacy with the deceased, and obtain a confidence which has resulted in a large bequest of at least 10,000*l*. I cannot but think that if Dr. Ashwell's character has in any degree suffered, he must be responsible for that himself. The Court can never feel any approbation of clandestine proceedings so carried on, and terminating in a large bequest to a medical practitioner from a patient whilst in attendance upon him. I therefore content myself in pronouncing for the validity of the will and codicil, and decree probate to Dr. Ashwell, as the executor named therein.

Proctors for executor: *Jennings & Son.*
Proctors for defendant: *Shephard, Bedford, & Middleton.*

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ADMINISTRATION BY CREDITORS—*Deceased a Pauper Lunatic—Guardians of Union—Creditors.*] Deceased, at the time of his death, had been for many years supported at a county lunatic asylum, as a lunatic, at the expense of the union to which he belonged. The guardians of such union had not obtained any order, under 16 & 17 Vict. c. 97, s. 104, from the magistrates authorizing them to take possession of the property of the deceased in order to repay themselves the charges to which they had been put on his account. The Court was asked to grant administration to the nominee of the guardians as creditors of the deceased, the deceased's sole next of kin, who was also a pauper lunatic, having been cited. The Court held that, even supposing the guardians to be creditors of the estate of the deceased, they were not entitled to a grant until they had cited the next of kin of the lunatic next of kin. WINDEATT *v.* SHARLAND - - 217

2. —— *Deceased a Pauper Lunatic—Guardians of Union—Creditors*—12 & 13 *Vict. c.* 103, *ss.* 16, 17.] The deceased, at the time of his death, had been for many years supported at a county lunatic asylum as a lunatic, at the expense of the union to which he belonged. At that time he was beneficially interested in a sum of 400*l.* 3 per cent. consols, standing in the name of trustees. His sister, the only next of kin or person entitled to his property, was also a pauper lunatic. The Court held that the guardians of the union to which the deceased belonged were, under the provisions of 12 & 13 Vict. c. 103, ss. 16, 17, creditors of the deceased, and granted administration to them for the use and benefit of the lunatic next of kin. WINDEATT *v.* SHARLAND - - - - - - 266

ADMINISTRATION BY STRANGER—*No one willing or able to take Grant as Next of Kin, or Person entitled in Distribution, or Creditor—Grant under* 20 & 21 *Vict. c.* 77, *s.* 73.] An intestate died, owing debts exceeding in value his personal estate and effects. Gifts of money had been made to him during his life by C., a relative of his deceased wife, to enable him to keep up his establishment, and after his death his debts were paid by C. There were only two next of kin and persons entitled in distribution, and of these one renounced and the other was a lunatic, and his next of kin renounced on his behalf:—The Court granted administration of the intestate's estate and effects to C. under the 73rd section of 20 & 21 Vict. c. 77. IN THE GOODS OF BATEMAN 242

2. —— *Nominee of Next of Kin*—20 & 21 *Vict. c.* 77, *s.* 73.] If the next of kin of a deceased are unable to agree amongst themselves which of them shall take administration of his estate, and are all willing that such administration shall be granted to a nominee who has no interest therein, that will not be a special circumstance to justify

ADMINISTRATION BY STRANGER—*continued.*
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ADMINISTRATION BY TRUSTEE—*Administration to a Mother—Nominee of the Majority of Next of Kin—Eldest Son Trustee under Father's Will—Property to be administered Part of Father's Estate—Practice.*] A deceased left a will, in which he made his wife executrix, and gave her a life interest in the whole of his property; on her death he directed it should be sold, and the proceeds divided amongst his children; and he appointed his eldest son and another person trustees, to carry such division into effect. The widow took probate of the will, and subsequently sold the property of her husband for 600*l.*; and with that sum, and 130*l.* of her own moneys, purchased two leasehold houses. On her death, the Court granted administration of her effects to the eldest son, the trustee named in their father's will, in preference to the nominee of the other next of kin, five in number. In the Goods of Sarah Stainton - - - - - 212

ADMINISTRATION PENDENTE LITE — *Testamentary Suit—Administrator pendente Lite acting under Directions of Court of Chancery—Interference of Court of Probate—20 & 21 Vict. c. 77, s. 70.*] An administrator pendente lite having been appointed by the Court of Probate, a suit was instituted in the Court of Chancery to administer the estate of the deceased, and an order made in such suit upon the administrator to sell certain property for the purpose of raising a fund to pay the debts due from the deceased's estate. The Court of Probate refused to interfere and stop the sale so ordered by the Court of Chancery. Tichborne *v.* Tichborne - - - - 41

2. —— *Testamentary Suit — Appointment of Executor not disputed—Practice.*] The deceased executed a will and two codicils, and by the will he appointed executors. A suit was instituted to try the validity of the second codicil only; such codicil in no way affecting the appointment of executors. The Court refused to appoint an administrator pendente lite. Mortimer *v.* Paull 85

3. —— *Testamentary Suit—Property of Deceased's Husband.*] A married woman, under a power given to her to that effect, duly executed a will. Her husband, by his will, made her universal legatee and sole executrix. She survived him, but did not take probate of his will nor re-execute her own. Litigation having arisen on the question whether the wife's executors are entitled to a limited or general grant of probate, the Court appointed an administrator pendente lite to the estate of the husband, as well as one to the estate of deceased. In the Goods of Dawes - - - - - - 147

ADMINISTRATION WITH WILL ANNEXED —*Majority of Interests—No Residue — Minor—Grant of Administration with Will annexed to unsuccessful Opponent of Will—Costs of Administrator's unsuccessful Opposition — Practice.*] One of four residuary legatees, who was also the testator's next of kin, unsuccessfully opposed the will, and was condemned in costs. The three other residuary legatees—who were

ADMINISTRATION WITH WILL ANNEXED—*continued.*
minors, and had, by their guardian, propounded the will—applied for a grant of administration with the will annexed to their guardian. The Court refused to make the grant to the guardian because it was proved that in fact there was no residue, and that the next of kin had larger interest in the specific legacies than the minors. The grant was therefore made to the next of kin, notwithstanding his unsuccessful opposition to the will; and the Court declined to make the grant conditional on the payment of the guardian's costs by the administrator, as by so doing it would delay the payment of legacies to other legatees besides the next of kin and the minors. Sawbridge *v.* Hill - - - - 219

2. —— *Residuary Legatee—Consent of Executor—Practice.*] The Court will not grant administration with the will annexed to the residuary legatee, with the consent of the executor. It can only do so on the executor's renunciation of probate, or after a citation has been served upon him, upon his non-appearance within the prescribed time. Garrard *v.* Garrard - - 238

3. —— *Unadministered Estate — American Domicil—Grant in America to a party not entitled to it by Law of England—Following Foreign Grants—Practice—20 & 21 Vict. c. 77 s. 73.*] When the deceased is domiciled in a foreign country, and an application is made to this Court, either for an original or a de bonis grant of administration, this Court will be prepared to make it to the person recognised by the proper Court of the foreign country. In the Goods of Hill - - - - - - 89

4. —— *Unadministered Estate—Grant to Representative of a Married Woman—Residuary Legatee.*] A married woman, a residuary legatee under the will of the deceased, by virtue of powers enabling her to do so, executed a will by which she distributed the property of which she had a right to dispose, her residuary interest being part of such property. The chain of executors being broken, a grant of administration, with the will annexed, of the unadministered estate of the deceased was made to the limited representative of the residuary legatee. In the Goods of Ditchfield - - - - - 152

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ADULTERY BROUGHT ABOUT BY PETITIONER'S AGENT—*Suit for Dissolution—Petition dismissed.* If a person, employed by a husband to watch his wife for the purpose of obtaining evidence of her adultery, brings about an act of adultery, the husband cannot obtain a decree of dissolution on the ground of adultery, although he may not have directed or authorized his agent to bring it about.—*Sugg* v. *Sugg* and *Moore* (31 L. J. (P. M. & A.) 41), considered. *Picken* v. *Picken* (34 L. J. (P. M. & A.) 22), affirmed. Gower *v.* Gower - - - - - - 428

ADULTERY SUBSEQUENT TO DECREE NISI—*Suit for Dissolution of Marriage—Decree Nisi—Intervention of Queen's Proctor—Demurrer.*] By 23 & 24 Vict. c. 144, s. 7, any one may shew cause why a decree nisi for a dissolution of marriage should not be made absolute by reason of material facts not brought before the Court:—*Held*, that the Court is bound before making a decree absolute to take notice of any material facts not previously brought before it, even although they occurred subsequently to the decree nisi, and consequently of adultery subsequent to the decree nisi, for adultery before the decree absolute is adultery during the marriage, one of the grounds on which the Court may refuse to dissolve a marriage. Hulse *v.* Hulse - 259

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ALIMONY—*Husband's Petition for Dissolution—Withdrawal.*] The husband petitioned the Court for a dissolution of his marriage, by reason of his wife's adultery. In her answer the wife denied such adultery, and made counter charges against the petitioner, of adultery and cruelty, which he denied, and directions were given as to the mode of trial of the facts in issue. The petitioner then moved for leave to withdraw the petition on payment of the wife's costs. A few days before the motion was made, the respondent filed a petition for alimony:—*Held*, that, if a wife use due diligence in claiming alimony, the husband will not be allowed to withdraw his petition until he has paid the alimony allotted to her up to the time of the withdrawal; but that if the wife delay to present her petition up to the last moment, so that the husband has not had time to answer it, the Court will not refuse to allow him to withdraw, until he has filed an answer to such petition, and paid what the Court may allot upon it. Twisleton *v.* Twisleton and Kelly - - 339

2. —— *Matrimonial Suit—Allowance from Father to Respondent.*] The father of the respondent, on her marriage with the petitioner, undertook, in a letter to the petitioner, to make her an allowance of 100*l.* per annum during his life.

ALIMONY—*continued.*
Such allowance had been paid for some years in one sum in a particular month of the year. The Court refused to grant to the respondent alimony out of her husband's income, which did not much exceed her allowance, the month in which it might be expected that the allowance would be paid not having arrived. Eaton *v.* Eaton— 51

3. —— *Matrimonial Suit—No Answer of Husband—Rule* 84—*Practice.*] In a matrimonial suit the wife filed a petition for alimony, to which the respondent did not answer. Under the 84th rule (Rules and Regulations, 1866) the Court made a peremptory order upon the respondent to file an answer to the petition for alimony within a week. Snowdon *v.* Snowdon - - 200

4. —— *Pendente Lite—Practice—Rules* 84 & 89—*Cross-examination of Witnesses.*] A husband who has not filed an answer on oath to the petition for alimony pendente lite under the 84th rule, cannot cross-examine the witnesses produced in support of the petition, on the motion for an allotment, or contradict their evidence. Constable *v.* Constable - - - - 17

5. —— *Judicial Separation—Permanent Alimony—Petition after Decree made—Practice.*] The Court for Divorce, acting upon the principles and rules in operation formerly in the Ecclesiastical Courts, will allow a petition for permanent alimony to be filed after it has made a final decree for judicial separation. Covell *v.* Covell 411
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ALLOWANCE TO WIFE—Separation deed 389
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ALTERATION OF WILL—*Codicil—Pencil Alterations in Will made before the Execution of Codicil not included in Probate.*] The testator executed a will and codicil. At some time after the execution of the will, but before that of the codicil, he, with a pencil, struck through several paragraphs of his will, and made his initials on the margin; he also placed a query opposite other paragraphs. The codicil confirmed, in so far as it did not alter, the will:—*Held*, that the alterations so made were only deliberative, and not final, and not included in the confirmation of the codicil, and, therefore, to be omitted from the probate. In the Goods of Hall - 256

AMENDMENT OF PETITION—*Suit for Dissolution of Marriage—Desertion and Adultery—Desertion not proved—Subsequent Amendment of Petition—Charge of Cruelty added—Practice.*] The wife petitioned the Court for a dissolution of marriage by reason of her husband's adultery, coupled with desertion. At the hearing, the Court held that the desertion was not proved, and adjourned the final decision in order that the petitioner might consider whether she would accept a judicial separation. Subsequently, the Court allowed her to amend her petition by adding a charge of cruelty, being satisfied from the affidavits that, until the hearing, she was ignorant

AMENDMENT OF PETITION—*continued.*
that the acts she could prove against her husband amounted to legal cruelty. PARKINSON *v.* PARKINSON - - - - - 27

2. —— *Suit for Dissolution — Cruelty and Adultery proved—Alteration of Prayer—Right of Respondent to oppose—Practice.*] A wife, having presented a petition praying for a dissolution of her marriage by reason of the cruelty and adultery of her husband, at the hearing proved both charges. The decree was suspended at her request, and on applying for a decree for judicial separation instead of a decree nisi for dissolution, the respondent opposed the application.—The Court refused to allow her to alter the prayer of her petition until the respondent had had an opportunity of bringing before the Court the facts on which he grounded his opposition. MYCOCK *v.* MYCOCK - - - - - - 98

3. —— *Matrimonial Suit—Adultery subsequent to the date of Petition—Practice.*] If it be expedient to bring before the Court acts of adultery alleged to have occurred after the date of the original petition, a supplemental petition should be filed for the purpose; and on the preliminary proceedings being completed the two petitions will be consolidated. BORHAM *v.* BORHAM 193

AMENDMENT OF PROBATE—*Will and Codicil—Probate—Alteration after it has issued.*] The Court allowed a probate to be amended after it had issued by the addition of a fuller description of the testator than therein contained in the first instance. IN THE GOODS OF G. TOWGOOD 408

APPEAL—Alimony pending appeal - 333
See COSTS OF WIFE.

—— Divorce Court—Suspension of proceedings
See DIVORCE COURT APPEAL. [292

—— Probate Court—Delivery of Probate 179
See PROBATE COURT APPEAL. 2.

—— Probate Court Leave—Costs - 169
See PROBATE COURT APPEAL. 1.

APPEARANCE—*Matrimonial Suit—Rules and Orders made by the Judge Ordinary alone—Rule 22—Absolute Appearance—Plea to Jurisdiction—Practice.*] The Judge Ordinary alone has power to make and alter or revoke rules and orders concerning the practice and procedure of the Court. *Charles* v. *Charles* (Law Rep. 1 P. & M. 260) considered and affirmed. A party who appears absolutely and not under protest, cannot plead to the jurisdiction, and delay filing an answer on the merits, until the question of jurisdiction raised by the plea be determined: but in his answer on the merits he may also plead the matters on which he relies as shewing that there is no jurisdiction. WILSON *v.* WILSON (FIRST CASE.) 341

2. —— *Suit for Dissolution—Co-respondent appearing under Protest—Dismissal from Suit.*] On a petition for dissolution of marriage brought by the husband, the respondent appeared absolutely, the co-respondent under protest. The co-respondent filed an act on petition, in which he set out facts to shew that the Court had no jurisdiction to entertain the suit. The petitioner filed an answer thereto; and there was a replication; and the act on petition was set down for hearing. The petitioner then applied to the Court to be allowed to withdraw his answer to

APPEARANCE—*continued.*
the act on petition, and that the co-respondent should be dismissed from the suit on the payment of his costs. The Court granted the application, notwithstanding the opposition of the co-respondent. WILSON *v.* WILSON (SECOND CASE) - 353

APPOINTMENT OF EXECUTOR—Administration pendente lite - - - - 85
See ADMINISTRATION PENDENTE LITE. 2.

—— Evidence to explain - 8, 46, 315
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ASSIZES—Issue to—Divorce Court - 263
See ISSUE TO THE ASSIZES.

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ATTESTATION—Will - 1, 97, 252, 300, 369, 451
See EXECUTION OF WILL. 1, 2, 3, 4, 6, 7.

AUTHORITY OF GUARDIAN - - 379
See GUARDIAN.

BANKRUPTCY—Co-respondent—Damages 189
See BANKRUPTCY OF CO-RESPONDENT.

BANKRUPTCY OF CO-RESPONDENT — *Matrimonial Suit—Damages—Non-payment—Practice.*] Damages having been given against a co-respondent, an order was made that the amount should be paid into the registry of the court within a certain time. Before such order had been made, the co-respondent became a bankrupt, and a trustee of his property was appointed. The damages were not paid into the registry, nor could they be proved under the bankruptcy. In order to facilitate the latter step, the court rescinded its former order, and directed that the damages should be paid to the petitioner himself. PATTERSON *v.* PATTERSON - - 189

BANNS—Undue publication - - 240
See NULLITY OF MARRIAGE. 4.

BURTHEN OF PROOF—Undue influence—Will
See UNDUE INFLUENCE. 1. [462

CANCELLATION—Will - - - - 172
See REVOCATION OF WILL. 1.

CASES—*Charles* v. *Charles* (Law Rep. 1 P.M. 260) affirmed - - - - - 341
See APPEARANCE. 1.

—— *Nott* v. *Nott* (Law Rep. 1 P. M. 251) distinguished - - - - - 25
See SEPARATION DEED.

—— *Picken* v. *Picken* (34 L. J. (P. M. & A.) 22 affirmed - - - - - 428
See ADULTERY BROUGHT ABOUT BY PETITIONER'S AGENT.

—— *Sugg* v. *Sugg & Moore* (31 L. J. (P. M. & A.) 41) considered - - - - 428
See ADULTERY BROUGHT ABOUT BY PETITIONER'S AGENT.

CHANCERY SUITS—Limited administration [371, 455
See LIMITED ADMINISTRATION. 2, 3.

CHOSE IN ACTION OF WIFE—*Administration—Deceased Married Woman—Husband Survivor—Chose in Action not reduced into Possession—Double Administration.*] The deceased, being entitled to a legacy on the death of another person, married, and died in the lifetime of her

CHOSE IN ACTION OF WIFE—*continued.*
husband, who also died before the legacy had become payable, and without having taken out administration to his wife:—*Held*, that the legacy formed part of the estate of the husband, and that administration to the deceased in respect of such legacy could only be granted to the representative of the husband. In the Goods of M. A. Harding - - - - - - 394

CITATION—Administration - - 81
See Citation to take Administration.

CITATION OF HEIR-AT-LAW—*Will and Codicils—Testator domiciled in Scotland—Will executed in Accordance with the Provisions of* 1 *Vict. c.* 26*—Not the Codicils—Will and Codicils valid by the Law of Scotland—Real Estate in England—*20 *&* 21 *Vict. c.* 77. *ss.* 61, 62*—Affidavit.*] The provisions of 20 & 21 Vict. c. 77, which authorize the citing of the heir-at-law or persons interested in the real estate, when contentious proceedings arise as to the validity of a will, and by which the probate of a will granted after such litigation is to enure to the benefit of all persons interested in the real estate affected by the will, are not applicable to wills executed before the Wills Act, or to wills which in whole or in part have been executed not in accordance with the requirements of the Wills Act. The affidavit upon which an application to cite the persons interested in the real estate affected by a will in dispute is based, must state not only that it disposes of real estate, but that it was executed according to the law of England, and at a date since the Wills Act came into operation. Campbell *v.* Lucy - - 209

CITATION OF HUSBAND—*Evidence as to Survivorship of Husband—Presumption as to his Death after seven Years' Absence.*] A married woman, whose husband was last heard of in 1853, died intestate in 1856. The Court refused to grant administration to her next of kin without citing the husband or his representatives. In the Goods of Nicholls - - - - - - 461

CITATION OF NEXT OF KIN—*Testamentary Suit—Subpœna to give Evidence as to State of Family—*20 *&* 21 *Vict. c.* 77, *s.* 24.] An executor being desirous to propound, in solemn form, the last will of his testator, cited certain next of kin, but was unable to ascertain what other persons were entitled in distribution. The Court, under 20 & 21 Vict. c. 77, s. 24, ordered a subpœna to issue for the attendance of certain persons to be examined as to their knowledge of the members of the family, and the other next of kin of the deceased. Shepheard *v.* Beetham - - - 384

CITATION TO TAKE ADMINISTRATION—*Proceedings in Chancery—Applicant no direct Interest—Practice.*] A citation ordered to issue against the only person interested in the estate of the deceased, calling upon him to take administration, on the application of a party who was interested in the due prosecution of a suit in Chancery, for which purpose a representative of the deceased's estate was required. In the Goods of Williams [81

CODICIL—Operation on Death - - 43
See Testamentary Paper.

—— Revocation - - - 78, 405, 406
See Revocation of Will. 2, 7, 8.

COMPROMISE—Testamentary Suit 181, 327
See Compromise of Testamentary Suit. 1, 2.

COMPROMISE OF TESTAMENTARY SUIT—*Verdict for the Will—Embodiment of Terms in Order of Court—Practice.*] During the progress of a testamentary suit, a compromise was entered into by the parties and committed to writing. A verdict was thereupon given for the validity of the will, but no order made as to the costs. The Court, two years afterwards, refused to permit the terms of compromise to be embodied in an order to be enforced as a rule of Court. Carritt *v.* Christian [181

2. —— *Persons not Parties to Suit, although cognizant of it, not bound by Compromise.*] A next of kin, although not cited to see proceedings, and not having intervened, is bound by a decree in a suit in which a will is contested by other next of kin, if he was cognizant of the suit and had an opportunity of intervening. But this rule does not apply to a case where the parties to the suit compromise it, and the decree is founded on the compromise.—The Court having pronounced for a will in consequence of a compromise between the parties contesting it, a next of kin, who was no party to the suit, although cognizant of it, was held not to be barred by the decree from instituting a fresh suit for the revocation of probate. Wytcherley *v.* Andrews - - - 327

CONCEALMENT OF MATERIAL FACTS—*Dissolution of Marriage—Intervention—*23 *&* 24 *Vict. c.* 144, *s.* 7.] The 7th section of 23 & 24 Vict. c. 144, does not empower the Court to withhold a decree of dissolution of marriage on the ground of the suppression of material facts by a petitioner, when it appears, upon all the facts being disclosed to the Court, that the petitioner is entitled to a decree.—A petition contained two charges of adultery, and alleged that neither of them had been condoned. The Queen's Proctor intervened and proved condonation of one adultery but not of the other, and the Court made a decree absolute on the ground of the uncondoned adultery, notwithstanding the suppression of the material fact of condonation of the other adultery. Alexandre *v.* Alexandre - - - - - 164

CONDONATION—*Dissolution—Effect of Agreement not to take Proceedings for Divorce—Adultery subsequent to Agreement.*] A wife knowing that her husband had been guilty of incestuous adultery with her sister, signed an agreement that she would forgive him, and would not take proceedings against him on account of such incestuous adultery, in consideration of his retirement from a then subsisting partnership in business with her father and brother. It was further agreed that they should not live together, but that they should see each other from time to time. The agreement also contained this clause: "The agreement or contract binds me (the wife) only so long as you remain true to me in love and duty." After the date of the agreement the husband was guilty of adultery, but not of incestuous adultery. The Court held that this subsequent adultery restored to the wife her right to have the marriage dissolved on the ground of the previous incestuous adultery.—Condoned incestuous adultery is re-

CONDONATION—*continued.*
vived by subsequent adultery not incestuous. Newsome *v.* Newsome - - - 306

CONFESSOR—Undue influence—Will - 462
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CONFLICT OF LAWS—Divorce abroad - 156
See Foreign Divorce.
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CONTEMPT OF COURT—Alteration of Settlement - - - - - 447
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CO-RESPONDENT—Appearance under protest
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See Separate Trials of Issues.

CO-RESPONDENT'S COSTS—Claim for Damages
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CORROBORATION—Evidence—Identity - 77
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COSTS—Divorce Court - - - 13
See Costs out of Separate Estate.
—— Divorce Court - - 16, 196, 202, 228
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—— Divorce Court—Proctor's lien - - 192
See Proctor's Lien.
—— Divorce Court—Queen's Proctor - 239
See Costs of Queen's Proctor.
—— Divorce Court—Separate property of wife
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—— Divorce Court—Solicitor—Dismissal of petition - - - - - 253
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—— Divorce Suit—Rescission of decree - 357
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—— Intervention by one of the public - 100
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—— Probate Court—Administration - 219
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—— Probate Court—Leave to appeal - 169
See Probate Court Appeal.
—— Probate Court—Proof in solemn form - 264
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—— Probate—Revocation - - - 20
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—— Restitution of conjugal rights - - 54
See Sequestration.
—— Reversal of decree nisi - - - 376
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—— Suit for nullity - - - - - 414
See Nullity of Marriage. 2.
—— Testamentary suit - - - 38
See Costs in Testamentary Suit.

COSTS—*continued.*
—— Wife's counter charges - - - 435
See Divorce Court Jurisdiction. 2.

COSTS AGAINST QUEEN'S PROCTOR—*Testamentary Suit—Undue Execution.*] The Court of Probate has no authority to condemn the Queen's Proctor in the costs of unsuccessful litigation. Atkinson *v.* Her Majesty's Proctor - 255

COSTS IN DIVORCE SUIT—*Claim for Damages—Adultery not proved—20 & 21 Vict. c. 85, ss. 33, 34, 51.*] The insertion in a petition of a claim for damages does not deprive the Court of the power to make such order as to costs as may seem just, given by the 51st section of 20 & 21 Vict. c. 85.—On the trial of an issue of adultery the alleged adulterer was called as a witness, and simply denied the charge without entering into any details or offering any explanation of his conduct. The jury were unable to agree upon their verdict, and the issue was tried a second time. On the second trial the alleged adulterer was again examined, and, besides denying the adultery, entered into full details and explained his conduct. The jury found that he was not guilty of the charge. The Court refused to condemn the petitioner in his costs on the ground that by his suspicious conduct and by his reticence on the first trial he had contributed to put the petitioner to the expense of a second trial. West *v.* West - - - - - 196

2. —— *Decree Absolute—Application for Costs against Respondent—Practice.*] After a decree has been made absolute in a suit for dissolution of marriage the Court cannot condemn a party in the costs of the proceedings. Wait *v.* Wait 228

3. —— *Suit for Dissolution—No Appearance for Respondent—Decree Nisi—Leave to Respondent to attend Taxation.*] In a suit for dissolution of marriage the husband, having no defence, did not enter an appearance, and a decree nisi was made against him. The Court gave him permission to attend before the registrar on the taxation of his wife's costs. Letts *v.* Letts - - 16

4. —— *Decree Nisi—Respondent and Co-respondent condemned in Costs.*] In a suit for dissolution of marriage by reason of adultery, both the respondent and co-respondent appeared and pleaded. At the trial no evidence was offered in support of any of their pleas, and a verdict having been returned in favour of the petitioner, with damages, a decree nisi was made. The respondent had a large separate income. The Court ordered her to pay the costs of the proceedings, and the co-respondent to pay such costs as had been incurred by the issues he had raised on his answer. Milne *v.* Milne - - - 202

COSTS IN TESTAMENTARY SUIT—*Will pronounced against—Heir-at-law an Intervener although not cited.*] In a testamentary suit between the executor of a will and one of the next of kin, the heir-at-law, although not cited, intervened, and the jury found that the deceased was not capable of executing a will at the time the will propounded bore date, and that he did not know and approve of its contents. On the issues of undue influence and fraud they decided in favour of the executors. The Court condemned the parties propounding the will in the whole costs of the next of kin and of he intervener. Rayson *v.* Parton - 38

COSTS OF PROOF IN SOLEMN FORM—*Testamentary Suit—Undue Influence pleaded—Notice—Rule* 41.] If the next of kin or others having a right to put executors upon proof of a will in solemn form of law, plead undue influence or fraud, they will be liable for costs, although they may have given a notice under rule 41 that they only intend to cross-examine the witnesses produced in support of the will. Harrington *v.* Bowyer - 264

COSTS OF QUEEN'S PROCTOR—*Administration Suit—Legitimacy of Deceased—Affirmative Verdict—No Costs asked for—Lapse of Nine Years—Application for Costs—Practice.*] In a suit between the Queen's Proctor and a party claiming to be the next of kin as to the legitimacy of a deceased, a verdict was given in favour of, and administration granted to, such alleged next of kin. Under the impression that he could pay his costs of suit out of the property of the deceased, no application was made by him to the Court at the time of trial in reference to that matter, but in consequence of proceedings in Chancery he had been unable to recover such costs. A citation having been served upon him to shew cause why the administration should not be revoked, by reason that he was not one of the next of kin of the deceased, he applied to the Court, after the lapse of nine years, to make a formal order that his costs of suit against the Queen's Proctor should be paid out of the deceased's estate. The Court refused to do so, *after* such lapse of time. Dyke *v.* Williams - - - - - 239

COSTS OF WIFE—*Suit for Judicial Separation—20 & 21 Vict. c.* 85, *ss.* 22, 51—*Rules* 158, 159 (1865)—*Appeal—Alimony pending Appeal.*] By 20 & 21 Vict. c. 85, s. 22, it is enacted that in suits for judicial separation, the Court for Divorce shall proceed, and act, and give relief on principles and rules as nearly as may be conformable to those on which the ecclesiastical courts gave relief, but subject to the provisions contained in the Act, and to the rules and orders under the Act; and by s. 51 the Court, at the hearing of any suit or petition under the Act, has authority to make such order as to costs as to it may seem just. By rule 159 (1865), the Court reserves to itself the power to refuse the wife her costs if the decision of the Court is against her:—*Held*, that although by the ordinary practice of the ecclesiastical courts the wife, unless she had a separate income, was entitled in every case to her costs of suit, the rule 159, which varies from that practice, has been properly made, and gives a reasonable and lawful discretion to the Court in the matter of costs.—Alimony is payable to the wife on an appeal, unless it shall appear to the Court that such appeal is frivolous and vexatious, or she has been guilty of laches. Jones *v.* Jones - - - - - 333

—— Counter charges disproved - - 435

See Divorce Court Jurisdiction.

COSTS OUT OF SEPARATE ESTATE—*Suit for Restitution by Husband—Gross Charges made by Respondent abandoned at the Hearing—Separate Income of Wife.*] The husband having sued for restitution of conjugal rights, the wife in her answer made charges of serious misconduct against him, which, however, were abandoned at the hearing. The Court made a decree in favour of the husband; but the wife evaded service of such decree by remaining out of the jurisdiction of the Court. On being satisfied that the wife had a sufficient separate income, the Court condemned her in the costs of the proceedings. Miller *v.* Miller - - - - - - 13

COUNTY COURT—Jurisdiction—Testamentary suit [154, 177

See County Court Jurisdiction. 1, 2.

COUNTY COURT JURISDICTION—*Testamentary Suit*—20 & 21 *Vict. c.* 77, *ss.* 54, 57, 59—21 & 22 *Vict. c.* 95, *s.* 10.] By 20 & 21 Vict. c. 77, s. 59, it is provided, that where, in any contentious matter arising out of an application for probate or administration, it is shewn to the Court of Probate that the state of the property, and the place of abode of the deceased, were such as to give contentious jurisdiction to the judge of a county court, the Court of Probate may send the cause to such court:—*Held*, that, where proceedings have been commenced in the Court of Probate, the Court will receive evidence from both sides as to the state of the property, and the place of abode of the deceased, before it determines whether or not it will send the cause to the proper county court. Slater *v.* Alvey - 154

2. —— *Testamentary Suit—Real Estate above* 300*l.*—*Mortgages.*] The estate of the deceased consisted of personalty under 20*l.* in value, and realty valued at 370*l.*, but subject to a mortgage for 100*l.*:—*Held*, that the county court of the district within which the testatrix resided at the time of her death, had not, under 21 & 22 Vict. c. 95, s. 10, contentious jurisdiction in such a case. Davies *v.* Brecknell - - - 177

COURT OF CHANCERY—Administrator acting under—Court of Probate - - 41

See Administration pendente Lite. 1.

CREDITORS — Administration — Poor Law guardian - - - 217, 266

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CRIMINATING QUESTIONS—Adultery - 29

See Evidence of Adultery.

CROSS-EXAMINATION AS TO ADULTERY—*Evidence—32 & 33 Vict. c.* 68, *s.* 3.] A witness cannot be cross-examined as to any act of adultery respecting which he or she has not been examined in chief, although such adultery may not be a question in issue in the cause. Babbage *v.* Babbage - - - - - 222

CRUELTY OF HUSBAND—*Judicial Separation—Cruelty—Undue Exercise of Marital Authority.*] If force, whether physical or moral, is systematically exerted to compel the submission of a wife to such a degree and during such a length of time as to injure her health and render a serious malady imminent, although there be no actual physical violence such as would justify a decree, it is legal cruelty, and entitles her to a judicial separation. Kelly *v.* Kelly - - 31; on appeal, 59

—— Dissolution of marriage — Amendment of petition - - - - 27

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DAMAGES—Divorce—Bankruptcy of co-respondent - - - - - 189

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DAMAGES—*continued.*
—— Peremptory order for payment - 53
See Damages in Divorce Court.

DAMAGES IN DIVORCE COURT—*Matrimonial Suit—Verdict for Petitioner—Damages—Co-respondent removing his Effects—Peremptory Order for Payment—Practice.*] In a suit for dissolution of marriage the jury found a verdict for the petitioner, and gave damages against the co-respondent. The Court made a decree nisi. Subsequently, on affidavit that the co-respondent had removed his furniture and other effects from his residence, the Court made a peremptory order that the damages should be paid to the petitioner within two days, and that, if they were not paid within that period, a writ of fi. fa. should issue forthwith. Pritchard *v.* Pritchard - 53

DEATH—Presumption—Citation - - 461
See Citation of Husband.

DECLARATION BY MEMBER OF FAMILY—*Evidence—Legitimacy—Admissibility of Declaration of the Person whose Legitimacy is the Question at issue—Practice.*] In an administration suit, the only question at issue before the jury was, whether M. D., through whom the defendants claimed, was legitimate. The defendants, after producing primâ facie evidence of the legitimacy of M. D., tendered his declarations in evidence. The plaintiffs objected to the admissibility of these declarations, and tendered evidence on the voir dire for the purpose of shewing that the declarant was not a member of the family. The Court being of opinion that the defendants had made out a primâ facie case of the declarant's legitimacy, admitted the evidence of the declarations, and rejected the evidence on voir dire tendered by the plaintiffs. Hitchins *v.* Eardley [248

DECREE ABSOLUTE—Suspension—Proctor's lien [192
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DECREE NISI—Subsequent adultery - 259
See Adultery subject to Decree Nisi.

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See Separation Deed. 1, 2.

DELAY—Unreasonable - - - 57
See Unreasonable Delay.

DESERTION—*Dissolution—Desertion before the Adultery complained of*—20 & 21 *Vict. c.* 85, *s.* 31.] The Court will not dissolve a marriage on the ground of the wife's adultery when satisfied that, before the date of the adultery complained of, the husband deserted her without reasonable excuse. Yeatman *v.* Yeatman - - 187
—— Dissolution of marriage—Amendment of petition - - - - 27
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See Separation Deed. 1.

DISOBEDIENCE—Restitution of conjugal rights—Sequestration without attachment 54
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—— Adultery—Prior desertion - - 187
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See Adultery subsequent to Decree Nisi.
—— Costs—Wife's separate property - 202
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—— Delay in instituting suit - - 57
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—— Foreign divorce - - - 156
See Foreign Divorce.
—— Insanity of respondent - 103, 109, 382
See Incapacity to Plead. 1, 2, 3.
—— Intervention by one of public - - 100
See Intervention.
—— Petition—Amendment - - 27, 98, 193
See Amendment of Petition. 1, 2, 3.

DIVORCE COURT APPEAL—*Matrimonial Suit—Rejection of Answer—Appeal—Suspension of Proceedings—Practice.*] In a suit for dissolution of marriage the respondent filed an answer, merely denying the jurisdiction of the Court, and such answer was ordered to be taken off the files, unless within a limited time the respondent amended it by adding thereto an answer on the merits. She thereupon entered an appeal from such order. Notwithstanding such appeal, the Court directed in what manner the petition, as unopposed, should be heard. Wilson *v.* Wilson - - 292

DIVORCE COURT JURISDICTION—*Bonâ fide Residence within the Jurisdiction—Occasional Residence—Suit for Judicial Separation.*] Mere residence in England at the time of the institution of a matrimonial suit is not sufficient to found the jurisdiction of the Court. The residence of the petitioner must be bonâ fide, and not casual or as a traveller.—A husband, whose domicil of origin was Irish, having presented a petition for judicial separation on the ground of desertion, the wife appeared under protest and pleaded to the jurisdiction. Although the husband made an affidavit, stating that he was permanently settled in England, and had no intention of returning to the place of his domicil of origin, the Court came to the conclusion, on the affidavits, that he was not a bonâ fide resident in England, and therefore dismissed the petition. Manning *v.* Manning 223

2. —— *Domicil — Delay — Wife's Costs of Counter Charges.*] A Scotchman married a Scotchwoman in Scotland, and cohabited with her in Scotland until he discovered her adultery. He thereupon, in 1866, broke up his home and removed to England; and in 1871 he instituted a suit in England for the dissolution of his marriage on the ground of the adultery committed in Scotland previous to the separation. He swore in his examination that he had left Scotland with the intention of taking up his permanent abode in England.—The Court believing his evidence, held that he had abandoned his domicil of origin, and acquired an English domicil, and that it had jurisdiction to dissolve the marriage.—The oath of the person whose domicil is in question as to his intention to change his domicil is not conclusive, but the

DIVORCE COURT JURISDICTION—*continued.*
question for the Court is whether, upon a review of all the circumstances, it gives credit to his evidence.—Adultery was committed in 1866, and a suit was instituted in 1871. The petitioner was a material witness on the issue of adultery. The inadmissibility of his evidence until after August, 1869, when the Evidence Further Amendment Act was passed, was accepted as sufficient explanation of the delay. Want of means is also a sufficient excuse for delay.—The wife's costs of counter charges of adultery against her husband were disallowed, although they had been paid into court, the evidence by which those counter charges were supported being false, and there being no reasonable ground for making them. WILSON *v.* WILSON - - - - - 435

—— Appearance - - - 341, 353
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DOMICIL—Administration—Foreign grant 89
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—— Divorce Court—Jurisdiction - - 435
See DIVORCE COURT JURISDICTION. 2.

—— Will—Probate - - - - 268
See WILL OF FOREIGNER.

"DOUBLE PROBATE"—*Property sworn under different Amounts—Practice.*]—One of two executors proved the will, swearing the property (the amount of which depended on the result of a pending suit in Chancery) under a certain amount, and paying the duty thereon. The other executor was allowed to take probate, swearing the property under a smaller amount. IN THE GOODS OF BELL - - - - - - 247

"EFFECTS"—*Will—Residue.*] A testator left to A. whatever money remained at his agent's, and also any money that might result from the sale of his effects:—*Held*, that A. was not entitled to administration as a residuary legatee. IN THE GOODS OF O'LOUGHLIN - - - - - 102

ENGLISH MARRIAGE—Divorce abroad - 156
See FOREIGN DIVORCE.

ESTOPPEL—Judgment - - - 230
See ESTOPPEL BY JUDGMENT.

ESTOPPEL BY JUDGMENT—*Administration Suit—Suit in Chancery—Certificate therein as to Next of Kin—Estoppel.*] If parties litigate a question in a court of competent jurisdiction, and a final decision be given thereon, such parties, or those claiming through them, cannot afterwards reopen the same question in another court. This restriction does not extend to other persons whose interest is almost identical with that of one of the parties to the first suit if they do not actually claim through such party. SPENCER *v.* WILLIAMS 230

EVIDENCE—Adultery—Questions to witness 29
See EVIDENCE OF ADULTERY.

—— Cross-examination—Adultery - 222
See CROSS-EXAMINATION AS TO ADULTERY.

EVIDENCE—*continued.*

—— Declaration by member of a family - 248
See DECLARATION BY MEMBER OF A FAMILY.

—— Impotence—Nullity of Marriage - 414
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—— Lunacy—Incapacity to plead - - 103
See INCAPACITY TO PLEAD. 1.

—— Next of kin—Citation - - - 384
See CITATION OF NEXT OF KIN.

—— Will—Construction - - 8, 46, 315
See EVIDENCE TO EXPLAIN WILL. 1, 2, 3.

—— Will—Parol evidence - - 8, 46, 315
See EVIDENCE TO EXPLAIN WILL. 1, 2, 3.

—— Witness—Examination - - 458
See EXAMINATION OF WITNESS.

EVIDENCE OF ADULTERY—*Witness not liable to be asked or bound to answer Questions—Evidence Further Amendment Act*, 1869 (32 & 33 *Vict. c.* 68), *s.* 3.] A witness who is called to prove adultery with one of the parties to a suit may claim the protection of the proviso in s. 3 of 32 & 33 Vict. c. 68, and the judge will not allow such witness to be interrogated on the subject of his or her adultery; but unless the protection of the proviso is claimed by the witness, the evidence is admissible, and it is not competent to counsel for either party to exclude it. HEBBLETHWAITE *v.* HEBBLETHWAITE. THE QUEEN'S PROCTOR INTERVENING - 29

EVIDENCE OF IDENTITY—*Evidence of Petitioner—Corroboration—Practice.*] The Court will not act upon the evidence of the petitioner as to the identity of the respondent without some corroboration. HARRIS *v.* HARRIS - - - 77

2. —— *Intervention of Queen's Proctor—Charge of Adultery—Primâ facie—Costs against Co-respondent.*] Upon the trial of an issue of adultery raised by the Queen's Proctor, intervening to shew cause against a decree nisi being made absolute, the Court does not require such strict proof of the identity of the person charged with adultery as upon the trial of such an issue in a suit between husband and wife. The petitioner having had notice of the time when, the place where, and the person with whom he was alleged to have committed adultery, and evidence being given that a person, passing by the petitioner's name and giving a card with the petitioner's name printed upon it, had been guilty of the alleged acts of adultery at the time and place and with the person specified, the Court *held* that there was primâ facie evidence of identity, and in the absence of evidence to rebut it, found the petitioner guilty, and dismissed his petition.—A decree nisi having been pronounced with costs against the co-respondent, the decree was rescinded on the ground of the petitioner's adultery committed subsequent to the date of the decree; but the order condemning the co-respondent in costs was not rescinded. HULSE *v.* HULSE AND TAVERNOR, THE QUEEN'S PROCTOR INTERVENING, - 357

EVIDENCE TO EXPLAIN WILL—*Appointment of Executor—My Nephew, A. B.—Wife's Nephew of that Name resident with Testator—Brother's Son—Parol Evidence.*] The testator appointed as executor to his will his nephew, A. B. At the time of the execution of the will there was living

EVIDENCE TO EXPLAIN WILL—*continued.*

a son of the brother of the testator of that name, with whom, however, the testator was not on terms of intimacy; and there was also a person of the same name, who was the nephew of the testator's wife, who had lived with him for many years, and had latterly managed his business:—*Held*, that where a word is used in a will as part of a description of a person specified by name, and is applicable to persons so named in an ordinary and popular sense, as well as in a strict and primary sense, an ambiguity is raised, and the Court may receive evidence of the circumstances in which the testator was placed when he executed his will, and of the sense in which he was accustomed to use the word in order to ascertain the person indicated. GRANT *v.* GRANT - - 8

2. —— *Appointment of Executor—Error in Name—Parol Evidence.*] The testator appointed as one of his executors Francis Courtenay Thorpe, of Hampton, gentleman. There was living a youth of twelve years of age to whom the name and description applied. The Court refused to admit evidence to shew that the testator intended the father of the youth, whose name was Francis Corbet Thorpe. IN THE GOODS OF PEEL - 46

3. —— *Appointment of Executor—Latent Ambiguity—Parol Evidence.*] The testator appointed as his executor his son, Forster Charter. He had no son of that name, but two sons named William Forster Charter and Charles Charter. The Court, on evidence of the circumstances under which the testator wrote the will, and of the position of the parties about him, and also on consideration of the contents of the will itself, determined that the latter was the person denoted by the will, and decreed probate to him. It would seem that in such a case the Court may receive parol evidence of the intention of the testator. CHARTER *v.* CHARTER - - - - - 315

EXAMINATION OF WITNESS—*Practice—Examination respecting Testamentary Paper*—20 & 21 *Vict. c.* 77, *s.* 26.] The examination of a person respecting his knowledge of testamentary papers under the 26th section of the 20 & 21 Vict. c. 77, must be either in open court or by interrogatories. IN THE GOODS OF LAWS - - - 458

EXECUTION OF WILL—*Acknowledgment of Signature—Attest and subscribe.*] The deceased having called in A., who was an illiterate man, to his room, asked him to make his mark to a paper, which he did. A., at the deceased's desire, then fetched his wife, who was living in the house, and she also, at the deceased's request, placed her mark on the same paper. There was no evidence that the signature of the deceased was on the will at the time these marks were made, nor did the deceased in any way explain to the witnesses the nature of the document they signed:—*Held*, that the execution was invalid. PEARSON *v.* PEARSON AND PEARSON - - - - - 451

2. —— *Attest and subscribe.*] The deceased executed his will in the presence of two witnesses, who signed their names in his presence, one opposite the word "executors," the other opposite the word "witness." There was no attestation clause to the will. The deceased intended one of the witnesses to be his executor, and asked him to

EXECUTION OF WILL—*continued.*

sign his name *in that character.*—The Court held, that such person did not sign the will exclusively as executor; but that he also intended by his signature to affirm that the deceased executed the will in his presence, and that consequently the execution was valid. GRIFFITHS *v.* GRIFFITHS AND GRIFFITHS - - - - - 300

3. —— *Signature of Testator not seen by Witnesses—Acknowledgment.*] The testator requested one person to attend to witness his will and another to witness a paper. They both attended at the time and place appointed, when the testator produced a paper so folded that no writing on it was visible, and informed them that in consequence of his wife's death it was necessary to make a change in his affairs, and he asked them to sign their names to it, which they did. The testator did not sign in their presence, nor did they see his signature. The paper had an attestation clause upon it in the handwriting of the testator, but not quite in the ordinary form:—*Held*, that there had been a sufficient acknowledgment of the signature. BECKETT *v.* HOWE - 1

4. —— *Name of Testator below Names of Witnesses—No evidence as to order in which Names written.*] The will of the deceased had an imperfect attestation clause, and the name of the deceased appeared written beneath the signatures of the attesting witnesses. The witnesses were both dead, and no evidence could be given as to the order in which the signatures were made. The Court, nevertheless, decreed probate of the will. IN THE GOODS OF PUDDEPHATT - - 97

5. —— *Words written below Signature of Testator*—15 *Vict. c.* 24.] In a testamentary paper executed by the deceased the last sentence commenced immediately above the signature of the deceased and was continued in three short lines to the left of it, the two last lines being somewhat below the signature. This sentence was written before the deceased signed her name:—*Held*, that under 15 Vict. c. 24, the execution was valid, and that the last sentence would be included in the probate. IN THE GOODS OF AINSWORTH - - 151

6. —— *Position of the Signatures of the Testator and Witnesses*—15 & 16 *Vict. c.* 24.] A will was written across the second and third sides of a sheet of note-paper, the lower part of such sides being left blank. The attestation clause and the signatures of the testator and witnesses were written at the back of the will, and therefore across the top of the first and fourth sides of the paper. The testator wrote the will in the presence of the witnesses immediately before he executed it: *Held*, that the will was well executed under 15 & 16 Vict. c. 24. IN THE GOODS OF ARCHER - 252

7. —— *Clause added after Deceased had signed the Will, partly above and partly beside the Signature*—15 *Vict. c.* 24.] The testator, after signing his name to his will in the presence of two witnesses, added a clause to it, the writing being squeezed into the space above and beside the signature. Immediately afterwards the witnesses signed their names:—*Held*, that the testator did not sign or acknowledge his signature to the will as containing such clause, and that probate should issue without it. IN THE GOODS OF ARTHUR 273

EXECUTOR—According to tenor - - 369
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—— Administration pendente lite - - 85
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—— Married woman's will - - - 183
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—— Scotch—confirmation - - - 86
See Scotch Executor.
—— Substituted - - - - 304
See Substituted Executor.

EXECUTOR ACCORDING TO THE TENOR—*Will—Trustee.*] Unless the Court can gather from the words of the will that a person named trustee therein is required to pay the debts of the deceased, and generally to administer his estate, it will not grant probate to him as executor according to the tenor thereof. In the Goods of Punchard 369

EXECUTOR FOR PROPERTY NOT NAMED—*Will.*] A testator by his will gave several specific legacies, but did not dispose of the residue of his personal estate. He appointed his daughter executrix for all property, wheresoever and whatsoever, not named in his will, and two other persons to be joint trustees. The Court refused to grant probate of the will to the daughter as executrix thereof. In the Goods of W. Wakeham - - 395

EXECUTOR OUT OF JURISDICTION—*Will—Small Estate—Administration with Will annexed—20 & 21 Vict. c. 77, s. 73.*] The deceased executed a will in which she appointed an executor who subsequently became bankrupt, and left this country for Australia. The property being small, on the consent of the next of kin the Court granted administration with the will annexed to one of the parties interested under it, by virtue of the authority given by 20 & 21 Vict. c. 77, s. 13. In the Goods of Cooper - - - - 21

2. —— 38 *Geo. 3, c. 87, ss. 1, 2, 3; 21 & 22 Vict. c. 95, s. 18—"At the expiration of Twelve Months from the Death of Testator."*] The words "at the expiration of twelve months from the death of the testator," in the first section of 38 Geo. 3, c. 87, when compared with the words given in the form of affidavit in the second section, and of the grant of administration in the third, must be held to mean at or after the expiration of that period. When the applicant is residuary legatee, whose interest is undetermined, the grant will be made under 38 Geo. 3, c. 87, but where a particular sum is set aside for and actually payable to the applicant, the grant can be made under 21 & 22 Vict. c. 95, s. 18. In the Goods of Thomas Ruddy - - - - - - 330

FAILURE OF TRUST—*Will—Residuary Legatee—Failure of Trust ascertained.*] A deceased, by his will, devised and bequeathed the residue of his real and personal estate to trustees, in trust for the benefit of his children, but in case of the failure of such trust for such of his two brothers as should be living at the time of the said failure of trust ascertained. At the time of his death the testator had no child, and his wife was not

FAILURE OF TRUST—*continued.*
enceinte; one brother died a fortnight after the testator:—*Held*, that the failure of the earlier trust, although not known, was determined on the death of the testator, and the residue vested at that time in the brothers, and therefore that the executors of the deceased brother, on the citation and non-appearance of the other brother, were entitled to a grant of administration with the will annexed of the goods of the deceased. Sidebottom and Hulme *v.* Sidebottom - - - 365

FOREIGN DIVORCE — *Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93)—English Marriage dissolved Abroad—Subsequent Marriage—Validity.*] The petitioner, whose original domicil was English, and who married in England, resided for two and a half years in one of the states of America, and then petitioned the competent court in that state for a dissolution of her marriage, on grounds for which, if proved, this Court would also dissolve an English marriage. No personal notice of the proceedings was given to the husband, who had never been within the state, and whose domicil continued to be English. The marriage having been dissolved, petitioner remarried in America in the lifetime of her first husband:—*Held*, that a divorce so obtained could have no legal effect upon an English marriage, and therefore the second marriage was invalid.—It would appear that if the petitioner had been legally domiciled in the state at the time the divorce was granted, the English courts would have recognised and acted on the decree. Shaw *v.* Her Majesty's Attorney-General 156

FOREIGN GRANT — Administration—American domicil - - - - - 89
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—— Will - - - - - - 268
See Will of Foreigner.

GUARDIAN—*Administration with the Will Annexed—Authority to a Guardian to appoint a New Guardian—12 Car. 2, c. 24, ss. 8, 9.*] A testator in his will appointed certain persons to be guardians of his daughter, and in case of the death of either of such persons he authorized the survivor to nominate another person as guardian in the place of the one so dying:—*Held*, that the 12 Car. 2, c. 24, s. 8, which enables a father to dispose of the custody and tuition of his minor child by will, sanctions his giving authority to a surviving guardian to nominate a person in the place of one who has died. In the Goods of Thomas Parnell - - - - - 379

GUARDIANS — Pauper Lunatic — Administration - - - - 217, 266
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HEIR-AT-LAW—Intervention—Costs - 38
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INCAPACITY TO PLEAD — *Evidence — Suit for Dissolution—Issue as to Lunacy raised by Guardian appointed by Court—Practice.*] A petition having been presented for dissolution of marriage by reason of the adultery of the respondent, and an allegation having been made and supported by affidavits that she was insane and incapable of pleading, a guardian was appointed by the Court for the purpose of raising that question on her behalf, and the issue was tried before the Court and a special jury. Mordaunt *v.* Mordaunt - - - - - - 103

2. —— *Suit for Dissolution — Respondent Insane—Stay of Proceedings—Practice.*] A petition was presented by a husband for a dissolution of his marriage by reason of the adultery of his wife. On an allegation that the respondent was insane, an issue was directed to try that question, and the jury found that on the day of the service of the citation the respondent was in such a condition of mental disorder as to be unfit and unable to answer the petition and to duly instruct her attorney for her defence, and that she had ever since remained and then still did remain so unfit and unable. Thereupon, the Judge Ordinary ordered that no further proceedings should be taken in the suit until the respondent recovered her mental capacity:—*Held*, on appeal, by the majority of the Court, that such order was right. Mordaunt *v.* Mordaunt, Cole, and Johnstone - - - - 100

3. —— *Matrimonial Suit — Insanity of Respondent — Dismissal of the Petition.*] In a matrimonial suit, a jury having found that the respondent was in such a state of mind as to be unfit to answer the petition or to instruct an attorney for her defence, an order was made that no further proceedings should be taken in the suit until she recovered her mental capacity. After a period of two years, and on evidence that the respondent was not likely to recover, the Court, on the application of the petitioner, dismissed the petition so as to afford him an opportunity to appeal against the order. Mordaunt *v.* Mordaunt - - - - - 382

INCESTUOUS ADULTERY—Condonation - 306
See Condonation.

INCONSISTENT WILLS—Probate - - 457
See Inconsistent Wills. 2.

INCORPORATION OF DOCUMENT WITH WILL —*Written Directions affixed thereto—None affixed—Insufficient Reference.*] The deceased, in 1866, executed a will, and a few days afterwards a paper, which he called directions to his executors, to form a part of his will. In 1868 he executed a fresh will, revoking all former wills and codicils. In this last will he expressed a wish that the goods and chattels in and about the rooms he should occupy at the time of his decease should be disposed of according to the written directions left by him, and affixed to his will. No paper was found affixed to his will, but the codicil

INCORPORATION OF DOCUMENT WITH WILL —*continued.*

above mentioned, which in many respects answered to the written directions described in the will, was found in his private room:—*Held*, that it could not be included in the probate. In the Goods of Gill - - - - - 6

2. —— *Will in India—Copy thereof referred to and confirmed in a Codicil.*] The deceased executed a will in India, which was deposited in a bank in that country. Subsequently, in this country, he executed a codicil to his will, which contained the following clause: "Of which will I, along with this codicil thereto, execute a copy, and homologate and confirm the same in all particulars, except in so far as altered or revoked by this codicil." At the time of the execution of the codicil the deceased produced a paper, which he informed the witnesses was a copy of his will:—*Held*, that the copy will so produced was incorporated in the codicil. In the Goods of Mercer - - - - - 91

3. —— *Will Written on First Side of a Half-sheet of Paper—Bequest on Back.*] The deceased, in his will, which was written by himself on the first side of a half-sheet of paper, gave his property to his wife for life, and then, intending to dispose of certain freehold cottages on the death of his wife, commenced a sentence which he left incomplete. After the incomplete sentence was an asterisk, and the words "see over." The will, which covered the whole of the first side, was executed at the bottom of that side, and at the top of the second side was another asterisk, and a devise of the cottages to his daughter. This bequest was written before the will was executed.—The Court held that the words on the second side were in the nature of an interlineation, and formed part of the will. In the Goods of Birt - - - - - 214

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INTERLINEATION—Will - - - 214
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INTERVENTION — *Dissolution of Marriage — Decree Nisi—Intervention of one of the Public—Costs—23 & 24 Vict. c. 144, s. 7.*] After a decree nisi for a dissolution of marriage, affidavits were filed by a private individual under the 7th section of 23 & 24 Vict. c. 144, setting out facts to induce the Court not to make the decree absolute. At the last moment the intervener withdrew his opposition, and the decree was made absolute:—*Held*, that the Court has no power to condemn an intervener in the costs of his intervention. Vivian *v.* Vivian; Leslie intervening - 100

—— Heir-at-law—Costs - - - 38
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INTERVENTION OF QUEEN'S PROCTOR—Evidence of identity - - - 357
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—— Reversal of decree nisi—Costs - 376
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—— Suppression of facts - - - 164
See Concealment of Material Facts.

ISSUE TO THE ASSIZES — *Matrimonial Suit— 20 & 21 Vict. c. 85, s. 40.*] The Court will not direct the issues of fact in a matrimonial suit to be tried in another court against the wishes of the husband, at whose cost the litigation is carried on. SNOWBALL *v.* SNOWBALL - - 263

JOINT ADMINISTRATION — *Joint Grant to Persons entitled in Distribution and to Nominee of Next of Kin — Consent of Persons interested — Joint Grant refused—20 & 21 Vict. c. 77, s. 73.*] The consent of all the persons interested is not a sufficient ground for departing from the general rules as to grants of administration. The Court therefore refused to make a joint grant under 20 & 21 Vict. c. 77, s. 73, to two of the persons interested in distribution, and to a nominee of the next of kin, although the next of kin and all the persons interested concurred in the application. IN THE GOODS OF RICHARDSON - - 244

2. —— *Widow and Guardian of Minor Children—Special Grounds.*] Deceased died intestate, leaving a widow and several minor children by a former wife. During his lifetime he had been assisted in his business by his brother. On the other hand, his widow, to whom he had been married but a short time, was entirely unacquainted with its management. These circumstances were held not to be sufficient to authorize the Court to grant a joint administration to the widow, and to the brother as guardian of the minor children. IN THE GOODS OF T. RICHARDS - 216

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JURISDICTION—County Court — Testamentary suit - - - 154, 177
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LIEN—Costs—Proctor - - - 192
See PROCTOR'S LIEN.

LIMITED ADMINISTRATION—7 *Wm. 4, and 1 Vict. c. 26, s. 33—Legatee Married Woman—Husband survived her, but died in Lifetime of Testator—Legatee's Representative.*] The deceased, a legatee under the will of her father, died in his lifetime, leaving issue at his death. She also left a husband surviving her, who, however, died before the father, having made a will, in which he appointed executors who took probate of the same. The Court granted administration to the son of the deceased limited to the personal estate bequeathed to her by the will of her father, and dispensed with the renunciation or citation of the surviving executor of the will of the husband of the deceased. IN THE GOODS OF MARY COUNCELL - - - - - 314

2. —— *Assignee—Property assigned not belonging to Assignor in his own Right.*] *A.*, under the impression that he was entitled in his own right to a share in the residue of a deceased's estate, assigned it for a sufficient consideration to *B.* At the time he executed the deed of assignment the share formed part of the estate of his father, to whom he was administrator. On the death of *A.* the Court refused to grant administration to the executor of *B.* of the estate of the father, limited to *A.*'s interest in such share, the value of which had been ascertained in the Court of Chancery, but made such grant as would enable him to institute proceedings in that court, and to receive whatever he might be held entitled to by it. BURDON *v.* MORGAN - - - 371

3. —— *Suit in Chancery — Second Grant — Practice.*] A grant of administration in the goods of a deceased limited to carry on proceedings in Chancery having lawfully issued and being still in force, the Court will not revoke it in order that a general grant may be made to the party who in the first instance would have been entitled thereto. The proper course is to supplement the limited grant with a grant of administration of the rest of the goods of the deceased. IN THE GOODS OF BROWN - 455

LIMITED PROBATE—Will of Married Woman—Separate estate - - 48
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—— Will—Power - - - - 183
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NEW TRIAL—*Suit for Dissolution—Cruelty—Adultery—Verdict on First Point only—Practice.*] In a suit for dissolution of marriage, brought by the wife by reason of the cruelty and adultery of her husband, the jury found a verdict for the petitioner on the question of cruelty, but were unable to agree to a verdict on that of adultery, and were discharged. The Court refused to allow the question of adultery only to be referred to a new jury, but gave the petitioner the alternative, either to have a rule, calling upon the respondent to shew cause why a decree of judicial separation should not be made on the ground of his cruelty, or to set down all the questions at issue, both adultery and cruelty, for a second trial. Godrich *v.* Godrich - - - - - 392

2. —— *Evidence of Cruelty—Surprise—New Trial as to some Charges of Cruelty, not as to all—Practice.*] A wife having charged her husband with cruelty by the communication of disease, and also by personal violence, the Court found, on the evidence, that the charge of communication of disease was not proved, and that the charge of personal violence was proved. On the application of the husband, a rule for the rehearing of the issue which had been found against him was made absolute, on the ground of surprise; but the rehearing was ordered to be confined to the charge of personal violence, and not to extend to the charge of infection. Lee *v.* Lee. Lee *v.* Lee 409

NEXT OF KIN—Evidence of state of family 384
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—— Nominee of—Administration - - 212
See Administration of Trustee.

NOMINEE OF NEXT OF KIN—Administration
See Administration by Trustee. [212

NULLITY OF MARRIAGE—*Incapacity of Woman—Practical Impossibility of Consummation—Absence of structural Defect.*] The ground of the interference of the Court in cases of impotence is the practical impossibility of consummation.—In a case where the parties had cohabited for two years and ten months, and the man's capacity and desire to consummate were not questioned, the Court being satisfied of the bonâ fides of the suit, and of the practical impossibility of consummation, in consequence of the condition of the woman, pronounced a decree of nullity, although there was no structural defect in the woman. G—— *v.* G—— - - - - 287

2. —— *Failure of Proof—Effect of Delay—Costs.* A wife married in 1863, cohabited with her husband until 1870, and in 1871 instituted a suit for nullity by reason of his impotency. Having failed to establish the charge, her suit was dismissed, and as she had separate property she was condemned in costs.—Relief in suits of this nature

NULLITY OF MARRIAGE—*continued.*
is never accorded by the Court unless the petitioner be prompt in seeking it and sincere in the motive for doing so. A petitioner made cognizant within four or five years after her marriage of her husband's impotency could not delay proceedings for three years more without being open to the charge of want of sincerity or promptitude. M. (falsely called C.) *v.* C. - - - - - 414

3. —— *Marriage Licence—4 Geo. 4, c. 76, s. 22—Marriage celebrated without Licence.* A marriage is valid although celebrated without banns or licence first had and obtained, unless both the parties were aware at the time of the ceremony of the absence of banns and licence.—A man applied for a licence on the 17th of June, and was married on the 18th of June, and the licence was not issued until the 19th of June. At the time when the ceremony was performed he was aware of the non-existence of the licence, but the woman was not. The marriage was held to be valid, as the parties had not wilfully intermarried without licence. Greaves *v.* Greaves [423

4. —— *Undue Publication of Banns—Fraud—4 Geo. 4, c. 76, s. 22.* A man gave notice for the publication of his marriage with a woman who was feeble both in health and mind. Such notice did not contain any material variation from the correct names of the parties. The woman had no knowledge that the notice was given or of the publication of the banns. The man only proposed marriage to her on the day before the ceremony took place:—*Held*, that the parties did not knowingly intermarry without due publication of banns, and that the marriage was valid. Templeton *v.* Tyree and Templeton, falsely called Tyree - - - - - 420

OCCASIONAL RESIDENCE—Divorce Court Jurisdiction - - - - 223
See Divorce Court Jurisdiction. 1.

OMISSION OF PARAGRAPH FROM PROBATE—*Practice.*] The Court of Probate will not order the omission from the probate, and from the copy of a will to be inserted in the books in the registry, of a paragraph of such will, on the ground that it makes a false charge against, or is offensive to the feelings of, an individual. In the Goods of Honywood - - - - - 251

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PAROL EVIDENCE—Will - - 8, 46, 315
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PROBATE COURT APPEAL—*Practice*—20 & 21 *Vict. c.* 77, *s.* 39—*Costs.*] Where there is an appeal from a final decree to the House of Lords, all interlocutory orders are under appeal, and it is unnecessary to obtain leave to appeal from such orders. Leave to appeal from an order discharging a rule for a new trial was refused on the ground that it was unnecessary, the final decree being under appeal.—An executrix having propounded a will in solemn form, the residuary clause, which was in her favour, was opposed, and the Court pronounced for the will, excluding the residuary clause from the probate on the ground that it had been obtained by her undue influence. The Court condemned her in the costs of the suit, with the exception of the costs of proving the will in solemn form, which she was allowed to take out of the estate. Smith *v.* Atkins - - - 169

2. —— *Suit—Probate ordered to be delivered out—Administrator pendente Lite—Practice.*] A suit having been instituted to try the validity of the will of a deceased, and judgment having been given to establish it, one of the parties appealed from such judgment to the House of Lords. Notwithstanding the appeal, the judge of the Court of Probate ordered probate to be delivered out to the executors named in the will. A difficulty having arisen in the Court of Chancery as to the power of the executors to give a good title to certain leasehold property belonging to the deceased's estate, under the probate and pending the appeal, the Court ordered the probate to be brought into the registry, and thereupon that letters of administration pending suit should be granted to such executors. Wright *v.* Rogers - 179

PROBATE OF TWO WILLS—*One limited to Property in England, another to Property in Tasmania—Separate Executors—Practice.*] The deceased executed a will purporting to dispose of, and in fact disposing only of, property in Tasmania, and appointed thereby executors resident in Tasmania. He subsequently executed another will disposing of his property in England, and thereby ratified and confirmed the will relating to the property in Tasmania. In this last will he appointed three executors distinct from those named in the earlier will. The Court ordered probate to issue of both papers as together containing the will of the deceased. In the Goods of Harris 83

2. —— *Appointment of Executor not revoked—Probate of both Wills.*] A testator left two wills, containing different and inconsistent dispositions of his property. The first will appointed an executor, and the second did not revoke that appointment, and appointed no fresh executor, and contained no general words of revocation. With the consent of all parties probate of both wills, as together containing the last will of the deceased, was granted to the executor named in the first will. In the Goods of Griffith 457

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PROCTOR'S LIEN—*Matrimonial Suit—Decree Absolute—Costs.*] The Court cannot, after the time limited by the statute, suspend a decree absolute on the ground that the petitioner has not paid his proctor's taxed costs. Patterson *v.* Patterson - - - - - 192

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REVERSAL OF DECREE—*Matrimonial Suit—Decree Nisi with Costs—Damages assessed—Intervention of Queen's Proctor.*] In a suit for dissolution of marriage heard before the Court and a common jury, a verdict was found against the respondent and co-respondent for adultery, and damages were assessed. A decree nisi was thereupon made, with costs against the co-respondent. The Queen's Proctor intervened; and ultimately it was proved that the petitioner had also been guilty of adultery. The Court reversed the whole decree nisi, including the order for costs, and dismissed the petition. Ravenscroft *v.* Ravenscroft and Smith; the Queen's Proctor intervening - - - - - 376

REVOCATION—Will 40, 78, 148, 172, 206, 397, [401, 403, 406
See Revocation of Will. 1, 2, 3, 4, 5, 6, 7, 8, 9.

REVOCATION OF PROBATE—*Testamentary Suit—Widow—Costs.*] The defendant, widow of the deceased, twelve months after the death of her husband, who died in Canada, took probate of a will in which she was named executrix. A month afterwards a citation was extracted by the plaintiff calling upon the defendant to bring such probate into the registry, which she did. The plaintiff then propounded a later will, and after a short delay the defendant withdrew from the suit. The Court declined to condemn her in the costs. Smith *v.* Fletcher - - - 20

REVOCATION OF WILL — *Cancellation — Presumption.*] After the due execution of a will has been proved, the burden of proving that it was revoked lies upon those who set up the revocation, and in the absence of evidence, revocation will not be presumed.—A will duly executed before the passing of the Wills Act, and remaining in the testator's custody until his death, after the passing of the Wills Act, was found with his signature crossed out. In the absence of evidence as to the date when the act of crossing out was done, the Court refused to presume that it was before 1838, and therefore pronounced for the will. Benson *v.* Benson - - - 172

2. —— *Codicil—Directions to destroy Will.*] The testator, in a letter addressed to his brother, which was signed by him in the presence of two witnesses, directed his brother to obtain his will and burn it without reading it:—*Held*, that the letter was a writing duly executed declaring an intention to revoke the will, and administration with the letter only annexed was granted to the next of kin of the deceased. In the Goods of Durance - - - - - 406

3. —— *First Lines cut and torn off.*] On the death of deceased a will was found in an iron chest, in which the deceased kept important papers. It had been written on the first sides of seven sheets of brief-paper, and had been signed by the deceased and witnesses on each sheet and at the end. The first seven or eight lines had been cut and torn off, but in other respects the will was complete:—*Held*, that from the mere cutting or tearing off the beginning of the will without other circumstances, it could not be inferred that the deceased intended to revoke the whole will, and that it must be admitted to probate in its incomplete state. In the Goods of John Woodward - - - - 206

4. —— *Intention.*] A testator, under the false impression that his will was invalid, tore it up. Immediately afterwards, on reconsideration, he collected the pieces, and placed them together amongst his papers of importance, and preserved them until his death:—*Held*, that as the act done was not accompanied by an intention to revoke a valid will, it was ineffectual, and the will was admitted to probate. Giles *v.* Warren - 401

5. —— *Memorandum of Revocation—1 Vict. c. 26, s. 20—Probate.*] At the foot of his will the deceased wrote a memorandum to the effect, "This will was cancelled this day;" and he duly executed such memorandum in the presence of two witnesses:—*Held*, that such memorandum was not a will or codicil, but only a writing, which could not be admitted to probate. In the Goods of Fraser - - - - - - 40

6. —— *Signature of Deceased cut out, but gummed into its original Place.*] On the death of the deceased a will was found, the signature to which had been cut out, but gummed on to its former place. The will had been in the custody of the testator up to the time of his death. Declarations of the deceased made subsequent to the date of the will were proved of an intention to benefit his wife by will. No other will was forthcoming:—*Held*, that the presumption that the deceased cut out the signature animo revocandi was not rebutted, and that the gumming on the signature in its original place did not revive the will. Bell *v.* Fothergill - - - 148

7. —— *Will Revoked—Codicil not Revoked—1 Vict. c. 26, s. 20.*] A testamentary paper in the form of a codicil to a will is not revoked by the revocation of the will. It can only be revoked by one of the modes indicated by the 20th section of the Wills Act. In the Goods of Savage - 78

8. —— *Will and Codicil—Will destroyed—1 Vict. c. 26, s. 20.*] The deceased executed a will

REVOCATION OF WILL—*continued.*
and codicil. In the latter she referred in several paragraphs to the dispositions contained in her will, and more particularly she bequeathed a certain legacy to be held under conditions stated in her will. She subsequently destroyed the will by burning it, but preserved the codicil:—*Held*, that as the codicil was not revoked by any of the methods prescribed by the Wills Act, it must be admitted to probate. In the Goods of E. H. Turner - - - - - - 403

9. —— *Two Wills—Appointment of Executor revoked without express Words of Revocation—Costs.*] A testator by his first will, executed in England according to English law, disposed of all his realty and personalty and appointed an executor. By his second and last will, executed in Italy, where he was domiciled at the time of his death, according to the law of Italy, he appointed his wife his universal heiress, and the will contained a revocatory clause in the following terms: "I erase, revoke, and annul every other act or last will which I may have made." The Court *held* that the Italian will revoked the disposition of the personalty and the appointment of executor contained in the English will, and that the Italian will alone was entitled to probate. The executor of the English will, who propounded it as entitled to probate with the Italian will, was condemned in costs. Cottrell *v.* Cottrell 397

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SCOTCH CONFIRMATION—Property in England
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SCOTCH EXECUTOR—*Scotch Confirmation—Sealed in England—Property in England not covered by First Grant—Additional Confirmation—Re-sealing—Practice—21 & 22 Vict. c. 56, ss. 12, 16.*] The deceased died domiciled in Scotland, and a confirmation issued from the proper officer to the widow, as executrix dative quâ relict of the defunct, on her filing an inventory of the property of the deceased, distinguishing which portion thereof was situated in Scotland, and which in England. This confirmation was sealed in the registry of the Court of Probate in England. Subsequently it was discovered that the deceased had left other property in this country, and on an additional inventory of such property being filed, an eik, or additional confirmation, was granted in Scotland to the widow. The Court ordered the seal of the Court of Probate to be attached to such additional confirmation. In the Goods of Ryde - 86

SEPARATE ESTATE—Will of married woman—Republication - - - 18
See Will of Married Woman. 2.

SEPARATE PROPERTY OF WIFE—Divorce costs
See Costs in Divorce Suit. 4. [202

SEPARATE TRIALS OF ISSUES—*Suit for Dissolution—Special Jury—Two Co-respondents—Practice.*] A petition alleged adultery between a respondent and co-respondent A. A. appeared to the citation served upon him, but did not file any answer. The petition was subsequently amended by alleging adultery with co-respondent B. B. appeared and denied the charge. The questions

SEPARATE TRIALS OF ISSUES—*continued.*
at issue were directed to be tried before the Court and a special jury. On the application of B., and on the condition that he should pay any extra costs to which the petitioner might be put by the order, the Court ordered that the questions at issue against B. should be tried separately from and before those against A. Cox *v.* Cox - 201

SEPARATION DEED—*Desertion.*] A husband deserted his wife, but within two years from the desertion a deed of separation was agreed to, by which he covenanted to make her an allowance and to charge it upon his reversionary interest in a sum of money. This deed was executed by the husband and wife, and by a trustee on behalf of the wife, but no part of the allowance had been paid:—*Held*, that the wife had bargained away her right to relief, and could not establish a charge of desertion without cause for two years.—*Nott* v. *Nott* (Law Rep. 1 P. & M. 251) distinguished. Parkinson *v.* Parkinson - - - 25

2. —— *Dissolution of Marriage—Deed of Separation—Allowance to the Wife—22 & 23 Vict. c. 61, s. 5.*] By a post-nuptial settlement certain property belonging to the respondent was assigned to trustees in trust, amongst other things, to pay the interest and annual proceeds thereof to her for her separate use. Subsequently a deed of separation was entered into between the parties with the same trustees as those of the post-nuptial settlement. By this deed the petitioner covenanted to pay the respondent an annuity for her life.—A decree for dissolution of marriage having been obtained on the ground of the respondent's adultery, application was made to the Court to vary the deed of separation, so as to relieve the petitioner from the payment of the above-mentioned annuity. The Court ordered that whenever any money should be payable to the respondent under the deed of separation the trustees should, out of the moneys in their hands payable to the respondent under the post-nuptial settlement, pay and apply a sum equal in amount upon such and the same trusts as would be applicable thereto in case the respondent were dead and had died in the lifetime of the petitioner. Bullock *v.* Bullock - - - - - 389

SEQUESTRATION—*Restitution of Conjugal Rights—Order to return home, and to pay Cost—Disobedience—Respondent out of Jurisdiction—Practice.*] In a suit for restitution of conjugal rights against a wife, there being no defence, the usual order was made that she should return to her husband's house within a certain number of days, and certify to the Court that she had done so, and on the Court being satisfied that she had a considerable separate estate, it further ordered that she pay the costs of the proceedings. The respondent was abroad and did not obey the order of the Court to return to her husband at all, or to pay the costs until after a long delay. The Court ordered a writ of sequestration to issue against her estate, in the first instance, without attachment. Miller *v.* Miller - - 54

SETTLEMENT—Divorce Court
[93, 163, 295, 426, 447
See Settlement by Divorce Court. 1, 2, 3, 4, 5.

SETTLEMENT BY DIVORCE COURT—*Dissolution of Marriage—Settlement—Whole Property settled by Respondent's Father—22 & 23 Vict. c. 61, s. 5—Dividends due before Order.*] On the marriage of the parties (which marriage was subsequently dissolved by reason of the adultery of the wife) the father of the respondent settled property, in the first place, for the benefit of his daughter for life, then for the benefit of her husband, and on the death of the survivor of them, for the benefit of their children. No property was settled on behalf of the petitioner. The Court varied the settlement by ordering the whole income of the settled property to be applied during the joint lives of the petitioner and respondent for the benefit of their children.—The Court has no authority to alter the destination of dividends due and payable before the date of its order. PAUL *v.* PAUL - - - - 93

2. —— 22 & 23 *Vict. c.* 61, *s.* 5.] The Court has no power to vary marriage settlements under 22 & 23 Vict. c. 61, s. 5, unless it be for the benefit of the children of the marriage or of their parents. A petitioner's father having covenanted to pay the respondent, after the petitioner's death, an annuity of 100*l.* during the joint lives of himself and the respondent, an order was made that after the petitioner's death the annuity should be applied for the benefit of the only child of the marriage; but the Court held that it had no power to deprive the respondent of the annuity in the event of her surviving the child. SYKES *v.* SYKES - - - - - 163

3. —— *Dissolution of Marriage—Decree Absolute—Settlement of Property of the Respondent in Possession or Reversion*—20 & 21 *Vict. c.* 85, *s.* 45.] Under the will of her father the respondent had a life interest to her separate use in certain property, unless she, being discovert, should do or suffer any act or thing, or any event should happen, whereby the same income, or any part thereof, should either voluntarily or involuntarily be aliened or incumbered, or be receivable otherwise than by herself personally, in which case the trust for her benefit was to be void, and such annual income was to be applied for the benefit of the respondent or her children at the discretion of the trustees.—On a decree for dissolution of marriage, the Court ordered a settlement to be made out of the respondent's life income derived under her father's will in favour of the petitioner and his children, but refused to extend the order to any moneys the trustees in their discretion might think proper to pay to her in case the substituted trust came into operation by reason of such order. Such a possibility of income is not property in reversion within the meaning of the statute. MILNE *v.* MILNE - - 295

4. —— 22 & 23 *Vct c.* 61, *s.* 5—*Children's Interest in Settlements.*] The Court has no power to vary a marriage settlement, by depriving an infant child of the marriage of any interest secured to it by such settlement. CRISP *v.* CRISP [426

5. —— *Dissolution of Marriage—Respondent in Contempt for removing her Child*—22 & 23 *Vict. c.* 61, *s.* 5—*Alteration of Settlement for the collateral Purpose of enforcing an Order of the Court.*] **SETTLEMENT BY DIVORCE COURT**—*continued.* After a decree nisi had been made on the prayer of the husband for a dissolution of his marriage, the respondent, under cover of an order of the Court for access to her child, took possession of it, and removed it beyond the jurisdiction of the Court:—The Judge Ordinary refused to alter the settlement made on the marriage of the parties, so far as relates to the property settled on behalf of the respondent, in such a manner and for the express purpose, to compel the respondent to submit to the authority of the Court, and to restore the child to the custody of the petitioner. SYMONDS *v.* SYMONDS AND HARRISON - 447

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STAY OF PROCEEDINGS—Dissolution of marriage —Lunacy - - - 103, 109, 382
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SUBSTITUTED EXECUTOR—*Will.*] The deceased, by his will, appointed his wife sole executrix, and, in default of her, two other persons to be executors. The wife took probate, and died:—*Held*, that such other persons were, on the death of the wife, entitled to administer the estate of the deceased as substituted executors. In the Goods of G. H. Foster - - - - - 304

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TAXATION OF COSTS—*Matrimonial Suit by a Wife—Parties returned to Cohabitation—Motion to dismiss—Attorney's Costs unpaid—Practice.*] A suit having been instituted on the part of a wife for a dissolution of her marriage, in which the husband had appeared and answered, an application was made on his behalf that the petition should be dismissed on an affidavit from the wife that the suit had been improperly instituted, and that she had returned to cohabitation. The Court ordered such application to stand over until the wife's attorney had had an opportunity to tax his costs and enforce them against the respondent. Dixon *v.* Dixon - - - - 253

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See Costs in Divorce Suit. 3.

TESTAMENTARY PAPER—*Codicil—Free Gift—Operation on Death.*] A deceased duly executed a paper which commenced, "I hereby make a free gift to," &c. The Court admitted parol evidence to explain the intention of the deceased, and being satisfied therefrom that he intended the operation of such paper to be dependent on his death, granted probate of it as a codicil to the will of the deceased. Robertson *v.* Smith and Lawrence - - - - - 43

2. —— *Will—Intention.*] The deceased executed in the presence of two witnesses a paper, which commenced, "I have given all that I have" to A. and her two sons. It contained directions in what way the deceased desired his property to be distributed; but without any direct reference to his death. There was evidence that he executed it as his will:—*Held*, that it was testamentary, and might be admitted to probate. In the Goods of W. Coles - - - 362

3. —— *Will—Printed Form—Partly filled up in Ink, partly with a Pencil—Probate.*] The deceased executed a printed form of a will. The blanks were filled up by the deceased in her own handwriting, partly with ink and partly with a pencil. Some portion of the writing in ink extended over that in pencil, and some words of the latter had been rubbed out and obliterated. The words in ink were sensible as read with the printed part of the will.—The attesting witnesses did not see the writing when they attested the will:—*Held*, that the words in pencil were deliberative only, and probate was granted without them. In the Goods of Adams - - 367

—— Examination of witness - - 458
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See Executor according to the Tenor.

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UNDUE INFLUENCE—*Testamentary Suit—Confessor and Penitent—Burthen of Proof.*] The plaintiff, a Roman Catholic priest, had resided with the testatrix and her husband many years as chaplain, and for a part of the time as confessor. He was confessor at the time the will in dispute was made. There was no evidence that the plaintiff had interfered in the making of such will, or that he had procured the gift of the residue to himself, or that he had brought such gift about by coercion or dominion exercised over the testatrix against her will, or by importunity not to be resisted. Moreover, it was not shewn that even in the common affairs of life, in business, or in anything else, the testatrix was under the plaintiff's control or dominion:—*Held*, that there was no evidence to go to a jury on an issue

UNDUE INFLUENCE—*continued.*
of undue influence. Natural influence exerted by one who possesses it to obtain a benefit for himself is undue inter vivos, so that gifts and contracts inter vivos between certain parties will be set aside, unless the party benefited can shew affirmatively that the other party could have formed a free and unfettered judgment in the matter; but such natural influence may be lawfully exercised to obtain a will or legacy. The rules, therefore, of courts of equity in relation to gifts inter vivos are not applicable to the making of wills. Parfitt *v.* Lawless - - 462

2. —— *Testamentary Suit — Physician and Patient.*] Although there is no rule of law which forbids a man to bequeath his property to his medical attendant, yet it is not a favourable circumstance for one in such a confidential position, with respect to a patient labouring under severe disease, to take a large benefit under such patient's will, more particularly if it be executed in secrecy, and the whole transaction assumes the character of a clandestine proceeding. In such a case the onus will lie very heavily upon the party benefited to maintain the validity of the will. Ashwell *v.* Lomi - - - - - 477

UNREASONABLE DELAY—20 & 21 *Vict. c.* 85, *s.* 31.] A wife separated from her husband in 1850, in consequence of his incestuous adultery with her sister; and in 1868 she presented a petition for a dissolution of marriage on the ground of that adultery. Her explanation of the delay which had occurred in presenting the petition was, that her mother was very anxious to avoid a public exposure of the scandal, and she yielded to her mother's urgent entreaties, and forbore to take proceedings until her mother's death:—*Held*, that the petitioner had been guilty of unreasonable delay, but not of such a character as to deprive her of her right to a decree. Newman *v.* Newman - - - - - 57

"VESTED INTEREST"—*Will—Residuary Legatees—Right to a de bonis Grant.*] The testator left by will to his wife a life interest in his real, leasehold, and personal estates, with permission to consume such portions of the latter as are consumable by nature. He also required her to maintain and educate their children. On the death or re-marriage of his widow he left his real and leasehold estates, and such personal estate as was then unconsumed, to his children in equal shares, their executors, administrators, and assigns, with a proviso that, if all and every his children died before obtaining a vested interest under the will, the property should go in equal shares to his then next and nearest of kin, and the then next and nearest of kin of his wife. The testator's only child survived him, but died in his mother's lifetime and previous to her re-marriage:—*Held*, that the child did not attain a vested interest under the will, and that administration must be granted to the next of kin of the testator. Greenhalgh *v.* Bates - - - 47

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—— Execution—Words below signature of testator - - - - 151
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—— Executor according to tenor - - 369
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—— Executor—Administration pendente lite 85
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—— "Vested interest" - - - 47
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WILL MADE ON CONTINGENCY—*Dispositions dependent on an Event.*] The deceased executed a paper, in which he made use of the following language: "Being obliged to leave England to join my regiment in China, I leave this paper containing my wishes. Should anything unfortunately happen to me whilst abroad, I wish everything that I may be in possession of at that time, or anything appertaining to me hereafter, to be divided," &c. The deceased returned to England from China:—*Held*, that the dispositions of the will were dependent upon the death of the deceased in China, and that therefore the will itself was conditional. In the Goods of Porter 22

2. —— *Disposition dependent upon an Event.*] The deceased, a master mariner, whilst on a voyage, wrote with his own hand a will which commenced "This is the last will and testament of me, that in case anything should happen to me during the remainder of the voyage from hence to Sicily and back to London, that I give and bequeath," &c.:—*Held*, that the dispositions of the will were dependent on the event referred to at the beginning of it, and that it had therefore only a contingent operation. In the Goods of G. T. Robinson - - - - - 171

3. —— *Condition.*] A mariner's will commencing, "Instructions to be followed if I die at sea or abroad," held to be conditional. Lindsay *v.* Lindsay - - - - - 459

WILL OF FOREIGNER—*Interest Suit—Foreign Domicil—Right to Grant of Probate or Administration—Succession to Property—Law of Foreign Domicil at Time of Death.*] The succession to property in England of a deceased foreigner is regulated by the law of his place of domicile as it existed at the time of his death.—A domiciled Paraguayan died in Paraguay, leaving personal property in England. After his death, but before a grant was made in England, a decree of the Government of Paraguay declared that all the property of the deceased, wheresoever situate, was the property of the nation of Paraguay. The Court held that, although by the law of Paraguay, as existing at the time when a grant of probate of the deceased's will was applied for, the will might be invalid, the right to the grant, and the succession to the property, must be governed by the law of Paraguay as it existed at the time of the death; and, therefore, that the Government of Paraguay had no locus standi to contest the validity of the will. Lynch *v.* The Provisional Government of Paraguay - - - - - 268

WILL OF MARRIED WOMAN—*Desertion—Protection Order—20 & 21 Vict. c. 85, s. 21.*] A woman having been deserted by her husband acquired some property by her own exertions, which she disposed of by will. Subsequently she obtained an order from the magistrates protecting her earnings and property:—*Held*, that such order had a retrospective effect, extending back to the commencement of the desertion; and that the will was a valid instrument to pass the property acquired by her during such desertion. In the Goods of Ann Elliott - - - 274

2. —— *Not re-published on Death of Husband—Probate—Extent of Limitation.*] By a post-nuptial settlement, an annuity for life was granted to the deceased, her executors, administrators, and assigns, by her husband. The parties afterwards separated, and a decree dissolving the marriage by reason of the adultery of the husband was obtained in a Scotch court. Such decree, however, was ineffectual in this country, as the marriage had been celebrated in England, and the parties domiciled here. Subsequently the husband died. After the decree made in Scotland, and before the death of her husband, the deceased executed a will, in which she expressed an intention to dispose of her separate property only. This will was not republished after the death of the husband, and the deceased made no other will. Probate was granted to the executor, limited to such property as he in his affidavit should state he believed to form part of the separate estate of the deceased. In the Goods of Crofts - 18

3. —— *General Residuary Clause—Testatrix survived her Husband—No Re-execution—Speaking from Date of Death—Form of Probate.*] The testatrix, when under coverture, executed a will, in which, having disposed of certain property to which she was entitled for her separate use, she bequeathed the residue of the real and personal estate which she should possess or have the power to dispose of at the time of her death to her niece. She survived her husband, who left to her considerable personal property, but she did not re-execute her will:—*Held*, that although the Court may be of opinion that the language of the will of a woman made during coverture, taking it to speak and take effect at the time of the death of the testatrix, is sufficiently large to include the whole property of the deceased, it will not grant a general probate, but limit it in such a way as to leave the whole question as to the property affected by such will open to a Court of Equity without concluding or prejudicing the rights of any party.—The 24th and 27th sections of the Wills Act (1 Vict. c. 26) apply to the wills of married women in the same manner as to those of other persons. Noble *v.* Phelps - - 276

4. —— *Trustees—Executors according to the Tenor.*] A married woman, who, under a deed of settlement, had a power of appointment by will over a trust fund, executed a will in which she directed the trustees of her marriage settlement to distribute her property in a particular way in accordance with the terms of such settlement, and gave them all the necessary powers of sale and mortgage the more effectually to carry her will into execution:—*Held*, that the will was the mere

WILL OF MARRIED WOMAN—*continued.*

execution of a power for the distribution of the funds already in the hands of the trustees, who, in such distribution, would still act under the settlement, and that they were not executors according to the tenor of the will. In the Goods of Mary Fraser - - - - - 183

5. —— *Inoperative — Probate.*] A married woman had a power under her marriage settlement to dispose of certain property by will in case there were no children of the marriage, or they all died under age, or in the lifetime of her husband. She executed a will in which she recited the conditions of her power, and out of the trust funds gave an annuity to a particular individual, and the rest to her husband absolutely. She survived her husband and the annuitant, but did not re-execute her will. There were several children of the marriage, who attained their respective majorities, and survived their mother, so that the will was inoperative. The Court refused to grant administration with the will annexed to one of the children, as he had no interest under the will, but granted to him a general administration of the deceased's estate, upon filing an affidavit that

WILL OF MARRIED WOMAN—*continued.*

she had left no will operative in law. In the Goods of Elizabeth Graham - - 385

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LONDON:
PRINTED BY WILLIAM CLOWES AND SONS,
STAMFORD STREET AND CHARING CROSS.